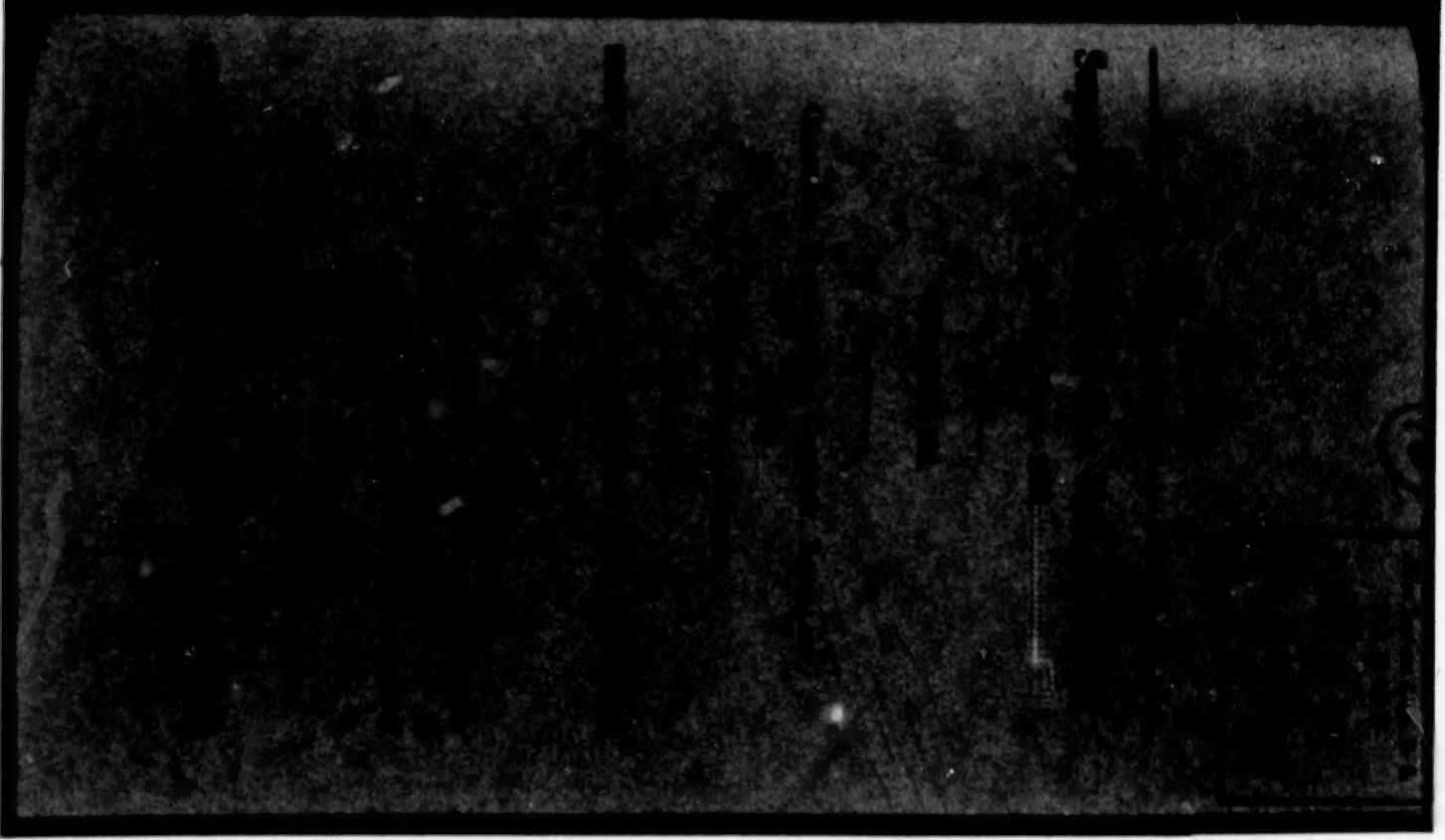

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31,288

Supreme Court of the United States

October Term, 1926.

NUMBER 154.

OKLAHOMA NATURAL GAS COMPANY, APPELLANT,

vs.

STATE OF OKLAHOMA, APPELLEE.

BRIEF AND PRINTED ARGUMENT FOR APPELLEE.

As stated by appellant in its brief, this is a writ of error to review a judgment of the Supreme Court of the State of Oklahoma rendered on June 2, 1925 (*Oklahoma Natural Gas Co. v. State of Oklahoma*, 110 Okla. 297, R 275), which judgment affirms an order of the Corporation Commission of the State of Oklahoma of June 7, 1920 (R. 9 and 242), and which required the appellant Oklahoma Natural Gas Co. and the Oklahoma Gas & Electric Co. as appellant's agent, to rebate and discount the charges made by said companies for gas service rendered to their pa-

trons in Oklahoma City during November and December, 1919, on account of inefficient service rendered during the period covered by said order.

During the early winter months of 1919-20, the supply of natural gas furnished by the Oklahoma Natural Gas Company through its transportation system to the distributing lines of the Oklahoma Gas & Electric Co., became so inadequate as to cause serious inconvenience, if not suffering, by reason of such inadequacy, such supply available at that time not being sufficient to afford that degree of service which was considered compatible with the necessities of the public during that period of time.

The Corporation Commission of the State of Oklahoma at various times since its organization has, by the promulgation of orders, required natural gas companies rendering service within the State of Oklahoma and coming within its jurisdiction, to furnish at all times a supply of gas for the consumption of its patrons, adequate both in amount and quality for "heating, cooking and lighting" for domestic consumption. The first of these orders was issued by the Commission on the 11th day of March, 1916, same being Order No. 1028 in Cause 2440, the material part of which reads as follows, to wit:

"It is therefore considered, ordered and adjudged that each and every corporation, association, company, individual, their trustees, lessees, or receivers, successors

or assigns (more particularly described above, Sec. 1, Chapter 93, Session Laws 1913) supplying natural gas for domestic consumption, or for the conveyance of gas by pipe line, for the production, transmission, delivery or furnishing of heat or light with gas, or in any way, directly or indirectly, supplying natural or artificial gas for domestic consumption, is hereby required to so construct and equip and maintain its pipe lines, main and distributing systems as to be able at all times to furnish an adequate supply of gas for domestic consumption and is hereby ordered to furnish and supply at all times an adequate amount of the proper quality for heating, cooking and lighting for domestic consumption."

The provisions of this order are still in force and effect and the Commission has from time to time attempted to enforce its requirements in connection with the service rendered by gas companies operating within the State of Oklahoma.

On the 9th day of February, 1918, the Commission made and entered its Order No. 1374 in Cause No. 3283, entitled *City of Nowata by R. C. Cauthorn, Commissioner of Public Welfare and Chairman of the Board of City Commissioners, Complainant,* v. *Nowata County Gas Company, a corporation, Defendant* 172 Okla. 184, 177 Pac. 618). In that case complainant alleged upon behalf of all the citizens of Nowata, Oklahoma, consuming natural gas as fuel, that the defendant had during all of the cold weather in the months of December, 1917, and January, 1918, failed, neglected and refused to supply the consumers of natural gas, patronizing it in the city of Nowata,

Oklahoma, with a sufficient, proper or adequate supply of gas for fuel and lighting purposes, as it was its duty to do as a public service corporation; that it had been necessary for many consumers to resort to the burning of coal, wood and other fuels on account of such inadequate supply of gas, and that great suffering had been endured by such patrons and consumers, and that business had been stifled and the public schools of Nowata had been forced to discontinue during a portion of the period in question by reason of the inadequate supply of gas by said Nowata County Gas Company. The prayer of the complainant asked for an investigation of the conditions prevailing during the time in question, and for an order compelling the defendant company to adjust its rates and charges so that the consumers would no longer be forced to pay for gas in excess of the benefits received, and that the company be restrained from discontinuing the service of any such patron until after a full and complete hearing shall be had and the proper adjustment made by the Corporation Commission. After hearing upon said complaint and based upon testimony which supported the allegations, the Commission made and entered Order No. 1374, in which it concluded that under the circumstances shown it was necessary for the gas company to maintain upon its lines in order to guarantee adequate and efficient service at the burner tip, a minimum pressure of 4 oz. and that

a pressure of 3 oz. would be regarded as three-fourths of that service which should be reasonably expected, that 2 oz. would be regarded as one-half of the service which should be reasonably expected, and that 1 oz. would only constitute 25 percent of that service which the gas company should render, and that less than 1 oz. would not constitute such a service as the consumer should be required to pay for. Pressure regulator charts were presented in that case, which showed the pressure maintained upon the pipe lines of the distributing company in various sections of the city of Nowata. There was no means by which the pressure actually maintained at the burner tip could be determined. The order made in that case was appealed to the Supreme Court of the State of Oklahoma and was affirmed by that court, 72 Okla 184, 177 Pac. 618. The Supreme Court of the State of Oklahoma, in discussing the basis adopted by the Commission for the requirement of rebates, said:

> "As we understand the order of the Commission, it proceeds upon the theory that, inasmuch as the maximum compensation of the gas company is allowed upon the basis of adequate service, where the service is not kept up to this standard the rate charged the public should be graded in proportion to the falling off in efficiency. On the other hand, it seems to be the contention of the gas company that it is entitled to pay at the maximum rate for the quantity of gas furnished, regardless of the efficiency of the service rendered the public. We think the rule announced by the Corporation Commission is entirely just and reason-

able, provided a practical basis for its application can be established, and we see no insuperable barrier in the way of doing this. In the case at bar, the Corporation Commission, it seems to us, have correctly solved the problem by the adoption of, what may be called, the efficiency table hereinbefore set out, and basing the proportion of the maximum rate the company may justly collect from the public upon the quality of the service rendered as well as upon the quantity of gas furnished. As it is conceded by counsel that this efficiency table and the computation of the Commission based thereon are correct, we are not prepared to say, in view of the constitutional presumption to the contrary, that the conclusion reached by the Commission in its order is unreasonable or unjust, or that it is unsupported by the evidence.

"What we have said before is decisive of the first two assignments of error and partially disposes of the third. The third assignment of error seems to be based upon the theory that, inasmuch as the gas company was operating under a fixed maximum rate during the months complained of, the Corporation Commission was without power to in any way affect or change this rate by the order made.

"The Commission, as we have seen, proceeded upon the theory that the maximum rate allowed was based upon 100 per cent efficiency, and that the reduction ordered was not for the purpose of changing the maximum rate for efficient service, but merely for the purpose of apportioning it according to the efficiency of the service rendered, as shown by the evidence and the efficiency scale adopted by the Commission. Taking this view of the matter, we think the order is unassailable on the ground urged."

During the pendency of the Nowata County Gas Co. case, *supra*, and even before the promulgation of the or-

der in that case, complaint was filed with the Commission by Charles H. Ruth et al., complainants, vs. Oklahoma Gas & Electric Co., defendants, and by T. F. Donnell et al., complainants, vs. Oklahoma Gas & Electric Co., defendants, and by Charles B. Selby et al., complainants, vs. Oklahoma Gas & Electric Co. and Oklahoma Natural Gas Co., defendants, which complaints were substantially the same insofar as the basis thereof is concerned, for relief on account of inefficient service rendered the gas patrons in Oklahoma City during the month of December, 1917, and the month of January, 1918. The three causes were consolidated and tried together, resulting in Order No. 1379, requiring discounts and rebates in the different districts served in Oklahoma City by the Oklahoma Gas & Electric Co., which receives its supply of gas from the Oklahoma Natural Gas Co., in proportion to the showing made by the pressure regulator charts which were offered in evidence and which indicated the amount of pressure maintained upon the gas lines of the distributing company for the period considered. From this order the Oklahoma Natural Gas Co. took its appeal to the Supreme Court of the State of Oklahoma and the case was decided on January 20, 1920, by an affirmance of the order of the Corporation Commission (78 Okla. 6, 188 Pac. 338). The court in deciding the case on appeal, after quoting extensively from the Nowata County Gas Co. case, *supra*, said:

"The Commission, in the order before us, used exactly the same basis in making discounts as it did in the Nowata case, and, inasmuch as the court's decision in that case disposes of other material issues herein, it only becomes necessary to consider whether the Commission's findings in this respect should be sustained, and the same, being *prima facie*, just, reasonable and correct, can be overcome or rebutted only by the facts in the record as weighed and found by this court in reviewing the same, with the burden upon the appellant, of making it clearly appear that the order made by the Commission is erroneous. *A. T. & S. F. Ry. Co. v. State*, 23 Okla. 210, 100 Pac. 11. After reviewing the evidence in the record we find no reason for rejecting the basis applied by the Commission in determining adequacy of service, or for disturbing the Commission's findings as to what pressure constitutes either adequate or partial service.

"Appellant insists that the order of the commission is beyond its jurisdiction and deprives the utilities of their property without due process of law. Jurisdiction over gas utilities was not included in that conferred upon the Commission by Sec. 18, Art. 9, Constitution, relating to transportation and transmission companies. *Shawnee Gas & Elect. Co. v. Corporation Commission*, 35 Okla. 454, 130 Pac. 127; *City of Pawhuska v. Pawhuska O. & G. Co., supra*. But all the powers and duties specified in the Constitution as to transportation and transmission companies, and others in addition thereto, were conferred over gas and other public utilities by chapter 93, Session Laws 1913. *Muskogee G. & E. Co. v. State et al., supra*.

"The power of the Corporation Commission to regulate rates and practices of gas utilities under this act is supreme, subject only to limitations imposed by the Legislature. *Guthrie Gas, Light, Fuel & Improvement Co. v. Board of Ed., supra; City of Pawhuska v.*

Panhandle G. & G. Co., supra; Muskogee Gas & E. Co. v. State et al., supra.

"The adjudging of the proportionate amount of the maximum rate which may be collected through failure of the utility to give adequate service, when the maximum rate is based upon adequate service, is a reasonable exercise of the jurisdiction of the Corporation Commission under this law.

"General Order No. 1028 of the Corporation Commission, effective since April 20, 1916, (Annual Report Corporation Commission, 1916, p. 447; Corporation Commission Laws 1917, Ann., p. 154) reads:

" 'Each and every corporation, association, company, individual, their trustees, lessees, or receivers, successors or assigns, (more particularly described Sec. 1, Chap. 93, Session Laws 1913), supplying natural gas for domestic consumption, or for the conveyance of gas by pipe line, for the production, transmission, delivery or furnishing of heat or light with gas, or in any way, directly or indirectly, supplying natural gas or artificial gas for domestic consumption, is hereby required to so construct and equip and maintain its pipe lines, mains, and distributing systems as to be able at all times to furnish an adequate supply of gas for domestic consumption, and is hereby ordered to furnish and supply at all times an adequate amount of proper quality for heating, cooking and lighting, for domestic consumption.'

"This order of the Commission is as much a law of the state as if enacted by the Legislature, and the utilities furnishing natural gas were as much subject to its provisions as if it had been made an integral part of the contract between consumer and the utilities.

"The order of the commission cannot be said to be a taking of property without due process of law. Hearing was had before a legally constituted tribunal, and

all the proceedings leading up to and including the hearing were regular, and denied appellant none of the rights constituting due process of law, and appeal has been taken to a court authorized by law to review the proceedings and findings of the commission. There is no evidence in the record to indicate that the discounts required reduce the revenues of the appellant to a point where it failed to receive an adequate return on the investment legally employed in the business of furnishing natural gas service, and, if such should result from a continuance of the commission's policy the utilities are not precluded from making application to the commission for higher rates.

"Since the order of the commission is merely an order adjusting rates in accordance with the schedule of rates prescribed for adequate service, this Court is not called upon to determine the matter judicially. *A., T. & S. F. Ry. Co. v. State*, 23 Okla. 510, 101 Pac. 262; *Salt Lake City v. Utah L. & T. Co.* (Utah), 173 Pac. 556."

Answering the argument of appellant that natural gas is a commodity and that the formula used as a basis for rebates in that case, and which is the same used in this case, denied the utility pay for that portion of the commodity actually furnished, the court says:

"Appellant contends that natural gas is a commodity (*Hope v. Kansas Nat. Gas Co.*, 221 U. S. 229, 55 L. ed. 716) and that the formula worked out by the commission for discounting bills denied the utilities pay for a portion of the commodity furnished. While, as a matter of fact, the product of natural gas as it comes from the wells and is put into interstate pipelines may be a commodity of interstate commerce, the furnishing of natural gas to domestic consumers under the laws of the State of Oklahoma and the rules and regulations of the Corporation Commission, is the

> rendering of a service and the failure to transport gas with sufficient pressure to render service, notwithstanding meter readings which the commission found indicate only volume, is a failure to render service. Volume of natural gas, it appears, is only one factor in indicating service, and is not the determining factor in indicating what service was rendered or the pay which the utility should receive therefor, and failure to receive payment on the basis of volume measured at the consumers' meters is not, therefore, a failure to receive payment for service, and is not a taking of the property of the gas utility without due process of law."

From this decision of the Supreme Court of the State of Oklahoma, appellants took their appeal to this Court, and as a basis for said appeal attacked the judgment of the Supreme Court of the State of Oklahoma and the order of the Corporation Commission, upon the identical grounds relied upon here for relief.

This Court, in its decision in *Okla. Nat. Gas. Co.* v. *State of Oklahoma*, 258 U. S. 234, upheld the decision of the Supreme Court of the State of Oklahoma and the order of the Corporation Commission, the opinion being by Mr. Justice McKenna, in the following language:

> "The company assails the reasoning and conclusions of the court and commission, and asserts that they penalize the company 'for failing to supply gas which nature had not produced.' It supplied, is the contention, the maximum amount which it could produce, and the commission found that it was not negligent in failing to supply more. It is the contention, therefore, that the order of the commission, and the action of

the Supreme Court in sustaining it, are offensive to the Constitution of the United States.

"The contention is based on a wrong estimate of the action of the commission and that of the court. Neither was based on deficiency in the volume of gas, but upon the failure of the company to transport it under sufficient pressure to render efficient service. It was the view of the commission and the court that the company owed efficient service, and for failing to supply it there should be a deduction in the compensation charged in proportion to the deficiency.

"The company assails both conclusions as depriving it of property without due process of law. We cannot assent. Both the commission and the Supreme Court decided, construing the charter of the company, that it, the company, was required to render efficient service, and we concur in that view, and that it was competent for the state to compensate the deficiency in the service—deficiency in the supply of gas by a rebate of the payments to the company. The percentage of reduction and its adequate relation to a deficiency in service were necessarily determined by the commission from the case as presented to it, and the Supreme Court, upon consideration, affirmed the determination as a just and supported relation. In the judgments of the commission and the court we are unable to see error—certainly not an infringement of the 14th Amendment.

"We repeat, therefore, the action of the commission and court was not, as represented by the company, a requirement of the impossible. It was simply and clearly the determination of what the franchise of the company required and the obligation to perform it, and the failure to perform justified a reduction of the fees charged, or, if paid, a proportionate repayment.

"We are not called upon, therefore, to review or

answer the interesting argument of the company, based upon the contention that the order of the commission imposed upon the company the impossible or the unreasonable. It imposed, we repeat, the performance of the service that the Gas Company had agreed to perform."

During the pendency in the Supreme Court of the State of Oklahoma and in this Court, of the case above mentioned, on the 6th day of November, 1919, the Commission promulgated Order No. 1599, which order was made pursuant to Sec. 18, of Art. 9, of the Constitution of the State of Oklahoma, the material portion of which is as follows, to wit:

"The Commission finds that an order embodying the substance of its proposed Order No. 164 is necessary in order that the Commission be properly informed of the nature and efficiency of the service furnished to the public by individuals, corporations, associations, companies, etc., engaged in the business of supplying natural or artificial gas to the public.

"It is therefore ordered that (1) all distributing companies shall keep recording pressure gauges at the point or points where gas is received from pipe lines or furnishing companies, showing the pressure of gas received at the distributing system.

"(2) All distributing companies shall keep recording pressure gauges at each and every regulator station, on the low pressure side thereof and at such points as may be necessary to record the pressure of gas furnished to consumers in any section not reflected with reasonable accuracy by pressure gauges at regulator stations.

"It is further ordered that such recording pressure gauges shall be of standard and satisfactory make,

being such as will clearly record the variations in pressure, and shall be kept in good repair and properly adjusted.

"It is further ordered that whenever the gas pressure shall register less than four (4) ounces at any recording gauge the company in charge thereof shall, so long as such gas shortage shall continue, make daily report to the Commission showing the pressure maintained during the preceding twenty-four (24) hour period at each station recording pressure below four (4) ounces."

The above order was made in full compliance with the law respecting the promulgation of general orders by the Commission. Thereafter, on the 13th day of December, 1919, the Commission adopted a Journal Entry supplementary to Order No. 1569, which in effect merely applied the abstract requirements of Order No. 1569 so as to require rebates in conformity to the rules already established by it in the Nowata County Gas Co. case, *supra*, in the Ruth-Selby-Donnell case, *supra*; the material portion of that order being as follows, to-wit:

"All distributors of natural gas to domestic consumers in the State of Oklahoma are hereby notified to deduct from the gas bill of each domestic consumer for such low pressure in accordance with Commission's Order No. 1374.

"All gas distributors are further notified not to discontinue service to any customer for failure to pay any gas bill which does not make proper reduction for insufficient service as provided in said order, as follows, to-wit:

"1. During the time when pressure is below four

ounces and not below three ounces, to be considered as 75 percent service.

"2. During the time when pressure is below three ounces and not below two ounces, to be considered as 50 percent service.

"3. During the time when pressure is below two ounces and not below one ounce, to be considered as 25 percent service.

"4. During the time when pressure is below one ounce, to be considered no service.

"The pressure as herein above referred to shall be determined by the nearest recording pressure gauge to consumer's meter."

We call attention to the fact, at this point, that the general order of the Commission, to-wit, Order No. 1599, requires no specific pressure at the burner tip of the patron but does require natural gas distributing systems within the State of Oklahoma, first, to keep recording pressure gauges at the point or points where gas is received from pipe lines or furnishing companies, showing the pressure of gas received at the distributing system; second, that distributing companies shall keep pressure gauges at each and every regulator station on the low pressure side at such points as may be necessary to record the pressure of gas furnished to consumers in any section not reflected with reasonable accuracy, with pressure gauges at regulator stations. These regulator stations were located in different points on the distributing system in any given community for the purpose of recording the amount

of pressure in any section of the city or town supplied. We retiterate there was no specific pressure required upon the patrons' premises, or at the burner tip, and indeed, there was no method by which such pressure could be determined, but only the pressure recorded in a community served by the regulator station could be gauged by the regulator required.

The Oklahoma Gas & Electric Co., the distributing company in Oklahoma City, pursuant to Order No. 1599, had established the regulator stations in the different sections of the city for the purpose of accurately gauging the amount of pressure which it was able to maintain on its lines prior to the beginning of the winter of 1919-20. On the 5th day of January, 1920, this company voluntarily presented to the Commission (R. p. 11) its pressure regulator charts showing the record of gas pressure at which gas had been furnished by it to its consumers in the city of Oklahoma City since October 20, 1919, and asking the Commission to investigate and determine discounts on bills for gas furnished by said company in Oklahoma City, and allowable during the periods of low pressure as prescribed by the orders referred to above. This was a voluntary appearance in which the distributing company actually invoked the jurisdiction of the commission, and sought action at its hands for the protection of itself as well as of its patrons served in Oklahoma City. The charts of the Oklahoma Gas & Electric Co. were filed with the

Commission as the basis for the relief suggested by the distributing company. Pursuant to said application of the Oklahoma Gas & Electric Co. and its representatives, a notice and tentative order was drawn, Order No. 1610, the material portion of which, after reciting the facts disclosed by the charts with respect to the pressure which had been maintained in the various districts (R. pp. 9-10-11), is as follows, to-wit:

"1. That in the portion of the city east of the Santa Fe railroad and north of the Rock Island railroad, which the company designates as District No. 1, the meters are read on the average of the 25th day of each month.

"(a) That the proper discount applying to bills in this district for gas used from approximate dates October 25th to November 25, 1919, is two (2) per cent.

"(b) That the proper discount applying to bills for gas used from approximate dates November 25 to December 25, 1919, in the portion of this district west of High street is fifteen (15) per cent.

"(c) That the proper discount applying to bills for gas used from approximate dates November 25 to December 25, 1919, in the portion of this district east of High street is twenty eight (28) per cent.

"2. That in the portion of the city west of the Santa Fe railroad, and north of 7th street from the Santa Fe railroad to Pennsylvania avenue, east of Pennsylvania avenue, from 7th street to 10th street and north of 10th street west from Pennsylvania avenue, which the company designates as District No. 2, the meters are read on the average of the third day of each month.

"(a) That in the portion of this district bounded by Francis avenue on the east, 21st street on the south, Pennsylvania avenue on the west and 36th street on the north, the proper discount applying to bills for gas used from approximate dates November 3rd to December 3, 1919, is one (1) per cent.

"(b) That in the portion of this district bounded by the Santa Fe railroad on the east, 7th street from Santa Fe railroad to Walker avenue and 12th street from Walker avenue to Dewey avenue on the south, Walker avenue, from 7th street to 12th street, and Dewey avenue from 12th street to 21st street on the west, and 21st street on the north, the proper discount applying to bills for gas used from approximate dates November 3rd to December 3, 1919, is seven (7) per cent.

"(c) That in the portion of this district bounded by Dewey avenue on the east, 12th street on the south, McKinley avenue on the west and 21st street on the north, the proper discount applying to bills for gas used from approximate dates November 3rd to December 3, 1919, is eight (8) per cent.

"(d) That in the portion of this district bounded by Walker avenue on the east, 7th street on the south, McKinley avenue on the west and 12th street on the north, the proper discount applying to bills for gas used from approximate dates November 3rd to December 3, 1919, is five (5) per cent.

"(e) That in the portion of this district bounded on the east by McKinley avenue, on the south by 7th street, on the west by Kentucky avenue, and on the north by 21st street, the proper discount applying to bills for gas used from approximate dates November 3rd to December 3, 1919, is four (4) per cent.

"(f) That in all other portions of this district there is no discount applying to bills for gas used from approximate dates November 3rd to December 3, 1919.

"3. That in the portion of the city lying west of the Santa Fe railroad on the east, north of the alley between 2nd and 3rd streets on the south, east of Pennsylvania avenue, on the west and south of 7th street on the north, which the company designates as district No. 3 north, the meters are read on the average date of the 12th day of each month.

"(a) That in the portion of this district east of Dewey avenue the proper discount applying to bills for gas used, from approximate dates November 12th to December 12, 1919, is eleven (11) per cent.

"(b) That in the portion of this district west of Dewey avenue, the proper discount applying to bills for gas used from approximate dates November 12, to December 12, 1919, is five (5) per cent.

"4. That in the portion of the city bounded on the east by the Santa Fe railroad from the alley between 2nd and 3rd streets to the Rock Island railroad and Byers avenue, from the Rock Island railroad to California avenue on the south by California avenue, on the west by Pennsylvania avenue, and on the north by the alley between 2nd and 3rd streets from Pennsylvania avenue to the Santa Fe railroad and the Rock Island railroad from the Santa Fe railroad to Byers avenue, which the company designates as District No. 4, and in which the meters are read on the average of the 20th day of each month.

"(a) That in the portion of this district east of the Santa Fe railroad, the proper discount applying to bills for gas used from approximate dates November 20th to December 20, 1919, is two (2) per cent.

"(b) That in the portion of this district between the Santa Fe railroad and Robinson avenue the proper discount applying to bills for gas used from approximate dates November 20th to December 20, 1919, is thirteen (13) per cent.

"(c) That in the portion of this district between

Robinson avenue and Shartel avenue, the proper discount applying to bills for gas used from approximate dates November 20, to December 20, 1919, is twenty-five (25) per cent.

"(d) That in the portion of this district between Shartel avenue and Western avenue, the proper discount applying to bills for gas used from approximate dates November 20 to December 20, 1919, is twenty (20) per cent.

"(e) That in the portion of this district lying west of Western avenue the proper discount applying to bills for gas used from approximate dates November 20 to December 20, 1919, is fifteen (15) per cent.

"5. That in the portion of the city lying south of California avenue from Pennsylvania to Byers avenue and south of the Rock Island right of way from Byers avenue east, which the company designates as District No. 3 South, the meters are read on the average of the 12th day of each month.

"(a) That in the portion of this district south of California avenue from the river on the east to Dewey avenue on the west, east of Dewey from California avenue to Ash avenue, north of Ash avenue from Dewey avenue to the first intersection of the river, west of Santa Fe avenue and north of the river, the proper discount applying to bills for gas used from approximate dates November 12 to December 12, 1919, is fifteen (15) per cent.

"(b) That in the portion of this district lying west of Dewey avenue from California avenue to the river, north of the river from Dewey avenue to a point midway between Western and Pennsylvania avenue, east of a north and south line through this point to California avenue and south of California avenue from this line to Dewey avenue, the proper discount applying to bills for gas used from approximate dates November 12 to December 12, 1919, is three (3) per cent.

"(c) That in the portion of this district lying east of Western avenue and south of the south boundary lines of the two above portions of the district named, the proper discount applying to bills for gas used from approximate dates November 12th to December 12, 1919, is twelve (12) per cent.

"(d) That in the remaining portion of this district lying west of Western avenue, south of the river from Western avenue to a point midway between Western and Pennsylvania avenue west of a north and south line from this point to California avenue, south of California avenue from this line, there is no discount on bills for gas used from approximate dates November 12th to December 12, 1919.

"Wherefore, premises considered, and the Commission being fully advised, it is therefore ordered:

"1. That the Oklahoma Gas & Electric Co. discount its bills for gas supplied to domestic consumers in Oklahoma City in accordance and compliance with the Commission's findings Nos. 1 to 5 inclusive in this order.

"2. That any readjustment made necessary by this order between the Oklahoma Gas & Electric Company and the Oklahoma Natural Gas Company shall be made in compliance with the contract now existing between the said companies.

"3. The Oklahoma Gas & Electric Co. and the Oklahoma Natural Gas Co. are hereby ordered to immediately perform and fully comply with the terms of this order in making the reductions herein required, or to appear before this Commission at its hearing room at the Capitol building, Oklahoma City, Oklahoma, on the 26th day of January, 1920, and show cause, if any they have, why they should not be required to carry out the terms of this order.

"Done at Oklahoma City this the 19th day of January, 1920.

"Corporation Commission of Oklahoma.

(Signed) "Campbell Russell, Comm'r.
"R. E. Echols, Comm'r.

"Attest—Seal.
(Signed) "J. E. Scott, Secretary."

The closing paragraph in said tentative order and notice (R. p. 14), provides that in case the Oklahoma Gas & Electric Co. and the Oklahoma Natural Gas Co. do not proceed to rebate in conformity to the orders of the Commission theretofore promulgated, and set forth above, that a hearing be set for the 26th day of January, 1920, at which time said companies were to show cause, if any, why they should not be required to carry out the terms of the order.

It will be noted by this order and notice, that rebates were not required in all sections of Oklahoma City and that different percentages of rebate were ordered in practically all the districts represented by pressure regulator charts kept in said districts, which pressure was evidenced by the filing of said charts with the Commission. On the date set, to wit, January 26, 1920, both the Oklahoma Natural Gas Co. and the Oklahoma Gas & Electric Co. appeared before the Commission and the Oklahoma Natural Gas Co. filed its response containing in substance the defenses suggested and contained in appellant's brief on

pages 14, 15, 16, 17, 18, and 19, which defenses are in substance, that the gas supplied by appellant was its property and was distributed by the Oklahoma Gas & Electric Co., its agent, under a contract between the two companies; that the tentative order and notice of the Commission is void, because predicated upon previous special orders to which appellant and its agent were not parties, and on which they had had no notice as required by Sec. 18, Art. 9, of the Oklahoma Constitution; that said tentative order and notice is violative of the 14th Amendment to the Constitution of the United States in that it was not a legislative order fixing future rates for gas or establishing future rule of action, but purports to apply retroactively a presently made rule or law to a past state of facts; that appellants have maintained ample facilities and had exercised the utmost diligence to procure and furnish an adequate supply of gas at the pressure desired; that natural gas is a commodity which only nature creates and which man cannot make by any expenditure, and which has natural limitations in its supply; that the shortage and low pressure existed because of the failing and depletion of the supply available, and in spite of appellant's efforts to provide and furnish a larger supply; that appellant's obligation to furnish an adequate supply is not absolute, and that it could not be denied the right to receive or charge the established rates for the quantity actually supplied at times when it was physically impossible to supply

more; that its obligation is only to exercise a high degree of diligence and care to furnish an adequate supply; that to require appellant to discount or rebate the charges made to its patrons for the quantity of gas actually furnished and used by them at the rate prescribed, on account of the fact that appellant could not furnish them all they needed or wanted, would operate to deprive it of its property without due process of law and to deny it the equal protection of the law and to take appellant's property for public and private use without compensation, in violation of the 14th Amendment; that the company had omitted no effort that any reasonable, diligent or provident person engaged in such business would have made to secure and furnish an adequate supply of gas, and that the shortage resulting in low pressure was not due to any negligence, carelessness, incompetency or indifference on its part, but solely to the failure of the supply of gas accessible to its lines; *that it had become an actual physical impossibility for appellant to furnish its patrons during the period of extreme cold weather, all the gas they wanted at the pressure desired;* that its patrons were under legal and constitutional obligations to pay the price for gas actually received, and to deny the right of appellant to collect therefor would be to deny it the equal protection of the law, in violation of the Fourteenth Amendment; that the tentative order and notice of the commission is arbitrary, unreasonable and in violation of the Fourteenth Amend-

ment, and that it takes no account of the actual facts with respect to individual consumers; that many consumers residing in the districts defined and in which rebates were ordered, used other fuels during the low pressure period and used no gas whatsoever during said period, or if any, only a negligible quantity for cooking purposes; but that nevertheless, the order required that discounts and rebates be made and given to each and every consumer residing in the districts described without regard to the facts with respect to each consumer; that the order is arbitrary and capricious, and violative of the Fourteenth Amendment, for the reason that the relative quantity or density and heating value of the gas actually furnished at the different pressures was not taken into consideration; that, if patrons are unwilling to pay for the gas actually delivered at times when the company is supplying its greatest quantities which it is able to supply and at the highest pressure which it is able to maintain, they should not be permitted to burn it, but should be required to burn other fuel, and if they do use the available quantity they should be required to pay therefor at the established rates; that the order deprives the company of its property without due process of law in that it provided that gas furnished at less than one ounce pressure should not be charged for; that, notwithstanding the supply of gas available to the company had failed and was still failing, its overhead expenses and investment remained undiminished, if not actually

increased; that the company was faced with the necessity of expending each year more than it earned in building new lines to other gas fields, which last only a short time, resulting in the necessity for an increased price instead of a decrease, and that to require it to discount the bills for the actual gas supplied would result in bankruptcy to the company.

At the conclusion of the hearing and taking of testimony, the Commission promulgated its order requiring refunds as set forth in the tentative order and notice of January 10, 1920, the material portion of which order is found commencing on page 242 of the record, and which requires the rebating or refunding of the percentages of gas bills determined theretofore, from the charts of the company distributing same (R. p. 9).

From this order of the commission an appeal was taken to the Supreme Court of the State of Oklahoma, where seven assignments of error were made, but only two of which were argued or depended upon for refusal of the Commission's action; to wit; first, that the facts and circumstances show the order unjust and unreasonable; second, the Commission's order is violative of the Fourteenth Amendment to the Constitution of the United States in that it deprives the company of their property without due process of law, and denies them the equal protection of the law. The case was decided by that court on June

2, 1925, 236 Pac. 893, the court adopting the syllabus in the case of *Oklahoma Natural Gas Co.* v. *State et al.*, 78 Okla. 5, *supra*. The court, in its opinion, after discussing the facts and some of the history of the Commission's policy of requiring refunds referring to previous decisions of the Supreme Court of the State of Oklahoma relative thereto, as well as to the decision of this Court in *Okla. Natural Gas Co.* v. *State*, 258 U. S. 235, *supra*, used the following language:

> "Counsel for appellant have filed elaborate briefs, from their standpoint, and counsel for appellee has also ably briefed the case. But a careful examination of the case of Oklahoma Natural Gas Co. vs. State, *supra*, and the case on appeal to the Supreme Court of the United States, *supra*, shows that both this court and the Supreme Court of the United States passed on both of these questions, and unless the expert testimony introduced in this case differentiates it from the former case, the decision of this court and the Supreme Court of the United States are binding and controlling. This court in *Oklahoma Natural Gas Co.* v. *State*, *supra*, uses the following language in the body of the opinion:
>
> " 'The question is whether there is evidence in the record to support the Corporation Commission's order. Findings of fact made by the Commission are by Sec. 22, Art. 9, of the Constitution, *prima facie*, just, reasonable and correct. *Atchison, T. & S. F. Ry. Co.* v. *State*, 25 Okla. 510, 101 Pac. 202; *Atchison, T. & S. F. R. Co.* v. *State*, 23 Okla. 210, 100 Pac. 11, 21 L. R. A. (N. S.) 903; *St. Louis & S. F. R. Co.* v. *Travelers Corp. of Okla.*, 47 Okla. 374, 148 Pac. 166; *Guthrie Gas, Light, Fuel & Improvement Co.* v. *Board of Ed.*, 64 Okla. 157, 166 Pac. 128; *City of Pawhuska* v. *Paw-*

huska O. & G. Co., 64 Okla. 214, 166 Pac. 1058; *Muskogee Gas & Elect. Co. v. State*, No. 10635 (not yet officially reported)'

"It will be observed that the Constitution of Oklahoma makes the findings of fact by the Commission *prima facie* just, reasonable and correct. The Commission found that equitable distribution of loss arising from poor and inadequate service, as between the gas companies and the consumers, could be arrived at by discounting the bills for service rendered each month on the basis outlined in said order, and after quite an extensive computation based upon the evidence, the Commission arrived at the conclusion stated in the order hereinbefore set out.

"The record in this case shows that a great deal of testimony was taken by both parties to the suit. In fact, there is very little controversy, as to the facts in the case, and we think the conclusion reached by the Corporation Commission are *prima facie* just, reasonable and correct. On the second proposition wherein appellants complain that the findings of the Commission are violative of the Fourteenth Amendment of the Constitution of the United States, this question was passed on adversely to the contention of appellant in the *Oklahoma Natural Gas Co. v. State*, supra, and also by the Supreme Court of the United States. So that question is settled. Those cases are binding on this court on that question. The record in the case is voluminous and the parties have filed voluminous briefs and we have carefully examined the record and briefs and have carefully read and considered the case of *Oklahoma Natural Gas Co. v. State*, 78 Okla. 5, and the opinion of the Supreme Court of the United States in the same case, 258 U. S. 234, and have reached the conclusion that the additional facts in this case are not sufficient to overturn the findings of the Commission on these facts. We are, therefore, of the opinion that the order of the

Corporation Commission appealed from should, in all things, be confirmed, and so recommend."

From this decision the case is now before this Court upon writ of error to the Supreme Court of the State of Oklahoma.

The Commission's Authority and Jurisdiction.

By the terms of Sec. 18, Art. 9, of the Constitution of the State of Oklahoma, the Corporation Commission is vested with the power and authority and charged with the duty of supervising, regulating and controlling of transportation and transmission companies doing business in the state, in all matters relating to the performance of their public duty and the charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies. The Commission is authorized to prescribe and enforce against such companies from time to time, such rates, charges, classifications of traffic, rules, regulations and requirements as to the establishment and maintenance of all such public service facilities and conveniences as may be reasonable and just, which such rates, charges, classifications, rules, regulations and requirements the commission is authorized from time to time to alter or amend. Any such company is prohibited to adopt or act upon any classification of charges or rates other than prescribed by the Commission, within the scope of its authority.

By the terms of Sec. 34, Art. 9, of the Constitution, the term "public service corporation" is defined to include all transportation and transmission companies, all gas, electric, light, heat and power companies, and all persons authorized to exercise the right of eminent domain or to use or occupy any right of way, street, alley or public highway, whether along, over or under the same, in a manner not permitted to the general public. Sec. 35 of the Constitution of the State of Oklahoma provides that after the second Monday in January, 1909, the Legislature may, by law, from time to time, alter, amend, revise or repeal Sections from 18 to 34, incl., or any of them. By an act of the Legislature of 1913, and found in Compiled Oklahoma Statutes 1921, at Sec. 3462, the term "public utilities" is defined in the following language:

> "The term 'public utilities' as used in this act, shall be taken to mean and include every corporation, association, company, individuals, their trustees, lessees, or receivers, successors or assigns, except cities, towns, or other bodies politic, that now or hereafter may own, operate, or manage any plant or equipment, or any part thereof, directly or indirectly, for public use, or may supply any commodity to be furnished to the public.
>
> "(a) For the conveyance of gas by pipe lines.
>
> "(b) For the production, transmission, delivery, or furnishing of heat or light with gas.
>
> "(c) For the production, transmission, delivery, or furnishing electric current for light, heat or power.
>
> "(d) For the transportation, delivery, or furnishing of water for domestic purposes or for power.

"The term 'Commission' shall be taken to mean Corporation Commission of Oklahoma."

By the same act, Sec. 3463, Compiled Oklahoma Statutes 1921, the general supervision of the Commission over public utilities is provided for in the following language:

"The Commission shall have general supervision over all public utilities, with power to fix and establish rates and to prescribe rules, requirements and regulations, affecting their services, operation, and the management and conduct of their business; shall inquire into the management of the business thereof, and the method in which same is conducted. It shall have full visitorial and inquisitorial power to examine such public utilities, and keep informed as to their general conditions, their capitalization, rates, plants, equipments, apparatus, and other property owned, leased, controlled, or operated, the value of same, the management, conduct, operation, practices and services; not only with respect to the adequacy, security and accommodation afforded by their service, but also with respect to their compliance with the provisions of this act, with the Constitution and laws of this state, and with the orders of the Commission."

In addition to the general authority outlined in Sec. 3463, the Legislature at that time set forth in Sec. 3464, Compiled Oklahoma Statutes 1921, the implied powers of the Commission, as follows:

"In addition to the powers enumerated, specified, mentioned, or indicated in this act, the Commission shall have all additional implied and incidental powers which may be proper and necessary to carry out, perform, and execute all powers herein enumerated, specified, mentioned or indicated, and to punish as

for contempt such corporation, association, company or individual, their trustees, lessees, receivers, successors and assigns, for the disobedience of its orders in the manner provided for punishment of transportation and transmission companies by the Constitution and laws of this State."

The power conferred upon the Corporation Commission by these provisions of statute have been held by the Supreme Court of the State of Oklahoma to be supreme, subject only to the limitations imposed by the Legislature.

Guthrie Gas, Light, Fuel & Improvement Co. v. Board of Education, 64 Okla. 157, 166 Pac. 128.

City of Pawhuska v. Pawhuska O. & G. Co., 64 Okla. 214, 166 Pac. 1058.

Muskogee Gas & Elect. Co. v. State et al., 81 Okla. 176, 186 Pac. 730.

Eagle-Picher Lead Co. v. Henrietta Gas. Co., 112 Okla. 65.

Oklahoma Natural Gas Co. v. Corporation Commission et al., 237 Pac. 838, 111 Okla. 6.

Muskogee Gas & Electric Co. v. State, 86 Okla. 58, 206 Pac. 242.

Appeals—Suspension of Penalties—Remedies.

The statute conferring jurisdiction and power upon the Corporation Commission with respect to the regulation of public utilities, provides specifically for an appeal by any party affected by any such order. Sec. 3466, Compiled Oklahoma Statutes, providing for such appeal, reads as follows, to wit:

"The Commission may, from time to time, adopt

> or promulgate such orders, rules, regulations or requirements, relative to investigations, inspections, tests, audits, and valuation of the plants and properties relative to inspection and tests of meters as in its judgment may be necessary and proper; provided, that under the provisions of this act, any public utility, corporation, association, company, individual, their trustees, lessees or receivers, successors or assigns, may appeal from any order or finding or judgment of the Corporation Commission as provided by law in cases tried and heard before said commission of transportation and transmission companies."

Section 20, Article 9 of the Constitution of the State of Oklahoma, provides for appeals from any action of the Commission prescribing rates, charges, classification of traffic, * * * or requiring additional facilities, conveniences or public service of any transportation or transmission company, by any concern whose rates, charges, or classification of traffic, schedule, facilities or conveniences or services are affected, or by any person deeming himself aggrieved by such action. This same section of the Constitution also provides that

> "A writ of mandamus and prohibition shall lie from the Supreme Court to the Commission in all cases where such writs respectively would lie to any inferior court or officer."

Section 3500, Compiled Oklahoma Statutes 1921, provides for appeals in proceedings before the Commission for contempt and the imposition of penalties for the violation of the Commission's orders. It also provides that upon the filing of an appeal bond in double the amount of

the fine or judgment, the same shall operate as a suspension of the fine and judgment appealed from.

Section 19 of Art. 9 of the Constitution of the State of Oklahoma provides that:

> "The Commission may be vested with such additional powers and charged with such other duties (not inconsistent with this Constitution) as may be prescribed by law in connection with the visitation, regulation or control of corporations or with the prescribing and enforcing of rates and charges to be observed in the conduct of any business where the State has the right to prescribe the rates and charges in connection therewith. * * *"

This section also provides that:

> "Any corporation failing or refusing to obey any valid order or requirement of the Commission within a reasonable time, not less than ten days as shall be fixed by the order, may be fined by the Commission (proceeding by due process of law as aforesaid), such sum not exceeding $500.00, as the Commission may deem proper, or such sum in excess of $500.00 as may be prescribed or authorized by law; each days' continuance of such failure or refusal, after due service upon such corporation of the order or requirement of the Commission, shall be a separate offense; *provided, that should the operation of such order or requirement be suspended pending any appeal therefrom, the period of such suspension shall not be computed against the company in the matter of its liability to fines or penalties.*"

In the decision of the Supreme Court of the State of Oklahoma in what has been referred to heretofore as the Ruth Selby-Donnell case, 78 Okla. 5, the court referred

to Order No. 1028 of the Commission, a portion of which has been set forth herein *supra*, and which has been referred to herein, and which requires natural gas companies "at all times to furnish an adequate supply of gas for domestic consumption, and is hereby ordered to furnish and supply at all times an adequate amount of the proper quality for heating, cooking, and lighting for domestic consumption." The court said: "This order of the Commission is as much a law of the State as if enacted by the Legislature, and the utilities furnishing natural gas were as much subject to its provision as if it had been made an integral part of the contract between consumer and the utility." Moreover, the Legislature of the State of Oklahoma has provided by Section 3470, Compiled Oklahoma Statutes 1921, that the Corporation Commission, "shall be and is vested with the power of a court of record to determine, first, the amount of revenue due in all cases where any public service corporation, person or firm as defined by the Constitution, charges an amount for any service rendered by such public service corporation, person or firm, in excess of the lawful rate in force at the time such charge was made, or may thereafter be declared to be the legal rate which should have been applied to the service rendered, and second, to whom the overcharge should be made."

Section 3471 provides that upon the ascertaining

of the amount of overcharge due from any public service corporation, the Commission shall have authority to render judgment against such public service corporation, person or firm, for the amount of such overcharge that may have been collected from the public in violation of any legal rate or order of the Commission, if necessary to insure the prompt payment of the same to the Commission.

The general authority of the Commission has been discussed in each of the cases referred to *supra*, and was referred to and upheld by this Court in the case of *Oklahoma Natural Gas Co. v. State of Oklahoma et al.*, 258 U. S. 234, 66 L. ed. 580, in the following language:

> "The Corporation Commission, by the Constitution and Laws of the State, is given power and authority, and is charged with the duty of supervising and regulating transportation companies and other public utilities, and given the same authority to prescribe rates which the State might prescribe or make. And the Supreme Court decided that any of the orders of the Commission prescribing rates and regulating the service of such utilities are as much a law of the State as if enacted by the legislature, and that a public utility, in furnishing natural gas, is as much subject to the provisions of such orders as if they had been made an integral part of the contract between the consumer and the public utility."

In a recent opinion by the Supreme Court of the State of Oklahoma, in a case involving efficient service, *Okla. Nat. Gas Co. v. Corporation Commission et al.*, 237 Pac. 838, the court discusses the different bases entering into

such service and applies the Act of the Legislature of 1913, Compiled Oklahoma Statutes 1921, Sec. 3462, and in the discussion used the following language:

"Chapter 93, Session Laws of 1913, gives the Corporation Commission general supervision over all public utilities with power to establish rates and to prescribe rules, requirements, and regulations relating to their service for the public.

"The Corporation Commission is vested by law with authority to prescribe rates to be charged by public service companies for gas delivered to their consumers. The maximum rate fixed by the Commission is based upon 100 per cent efficient service to be had from a 'given volume' of natural gas. The term 'given volume' of gas has reference to the quality and class of gas, which the Corporation Commission contemplates should be delivered to the consumer to meet the requirement for 100 per cent efficient service upon which the rate is based. The statement of the rule meets with less difficulty than its definition. There are four persons concerned: the producer of the gas, the common carrier to the city gates, the distributing company and the consumer. The first three parties are entitled to a reasonable return for their property and service. The duty rests upon the former three parties to deliver a fair quality of gas from the general gas production of the field to the consumer, reasonably suited to meet the requirements of the latter, with no greater burden than a reasonable profit to the three former parties. The situation and relation of the parties, one to the other, require the application of the golden rule, 'Live and let live.' The rule for ascertaining the 'given volume' of gas as contemplated by the Commission, to constitute 100 per cent efficient service, is a question of law for the Commission and court. Whether or not the gas as furnished to the consumer for a given period of time, equals the degree

of efficiency or quality upon which the rate is based, is a question of fact to be established by proof in the particular case. * * *.

* * * * * * * * * *

"The term 'efficient quality' includes pressure, volume of gas, quality of gas and the quality of gas generally produced in the fields and available for supplying the consumers. All these elements and the general conditions must be taken into consideration in determining what the Commission meant in using the term 'adequate supply and good quality of gas' in Order No. 1028. The term as used in Order No. 1028 must be construed in the light of the conditions and circumstances entering into the action of fixing the rate for gas to the consumer by the Commission. What might be a good quality of gas as defined by the order under one condition might be a poor quality under the conditions and circumstances existing during another period of time. *Okla. Nat. Gas Co.* v. *State et al.*, 78 Okla. 5, 188 Pac. 338; *Id.*, 258 U. S. 234, 42 Sup. Ct. 287, 66 L. ed. 590; *Noucata County Gas Co.* v. *State et al.*, 72 Okla. 184, 117 Pac. 618."

There is no distinction between this case and the Oklahoma Natural Gas Co. vs. State of Oklahoma, 258 U. S. 234.

Counsel for appellant appear solicitous for fear that the Court should consider this case as being ruled by its decision in the case of *Oklahoma Natural Gas Co.* v. *State of Oklahoma*, 258 U. S. 234, *supra*, and makes the sweeping statements that the two cases are entirely different and that every fact constituting the basis of the Court's ruling in the case heretofore decided, was either stipulated or proved not to be true.

An attempt is made to set forth these distinctions under four heads.

First: Under distinction No. 1 is set forth the contention in the former case to the effect that natural gas cannot be made by man by any expenditure, that it is made only by nature and that the shortage was caused by the unavoidable failure of the gas fields and wells, and that to require it to discount its bills for the gas actually furnished, operated to deprive it of its property without due process of law in violation of the Fourteenth Amendment.

We submit in all candor that the position stated is exactly the contention which has been made in this case and which is disclosed by the record from beginning to end, and particularly by defendant's answer before the Corporation Commission (R. page 15—Abst. 4-16). This Court in answer to the contention made in the former case, identical with the contention made here that the order of the Commission was a requirement of the impossible, as set forth in the brief and appellant's answer, said:

> "The contention is based on a wrong estimate of the action of the Commission and that of the court. Neither was based on deficiency in the volume of gas, but upon the failure of the company to transport it under sufficient pressure to render efficient service. * * * We repeat, therefore, the action of the Commission and court was not, as represented by the company, a requirement of the impossible."

It is then set forth that in this case the evidence is

full, explicit and conclusive, and was not disputed or controverted, that there is a fixed and definite relation between the volume or supply of gas available and the pressure at which it can be furnished; that the pressure varies with the volume or supply, and that when the demand is greater than the supply, it is humanly impossible to maintain the desired pressure; that pressure is merely indicative of the rate of supply, and that a requirement that the company maintain a fixed pressure is in fact a requirement that it furnish the volume that will flow through the lines at that pressure; and that such requirement, when it is not possible for the company to procure such volume, "is a requirement of the impossible."

It is then stated that the foregoing facts were not controverted in the hearing before the Commission, and that no findings of fact otherwise are to be found in the order.

In this connection it is interesting to call the attention of the Court to its opinion in the former case, which refers to the order made by the Commission upon which the former appeal was taken. The Court, in that case, said:

> "We can only say that the Commission found the quality of gas deficient, but otherwise found for the companies. For instance, the Commission found that storage facilities for a reserve supply, as prayed, were impossible. It found also against the charge that the companies had been guilty of negligence for failure to extend their lines to other and more abund-

ant sources of supply. Indeed, the Commission intimating a doubt of its power to do so, refused to exercise the power against the companies, circumstances not demanding it."

Again, the court said, further on in its opinion:

"The company assails the reasoning and conclusions of the court and Commission, and asserts that they penalize the company 'for failing to supply gas which nature had not produced.' It supplied, is the contention, the maximum amount which it could produce, *and the Commission found that it was not negligent in failing to supply more.*"

Second: Under the second attempted distinction it is stated that "this Court seemed of the opinion, from some statement of the Supreme Court of the State of Oklahoma, that the charters or franchises of the companies were so phrased as to impose upon them, not the usual common law obligation of one in the public service to exercise reasonable care and diligence to supply the demands of the public, but an absolute contractual obligation to supply the full demand at all times, at all events, and under all circumstances." The opinion of the court is then quoted to the effect that:

"Both the Commission and the Supreme Court decided, construing the charter of the company, that it, the company, was required to render efficient service, and we concur in that view. * * *. We repeat, therefore, the action of the Commission and court was not, as represented by the company, a requirement of the impossible. It was simply and clearly the determination of what the franchise of the company required

and the obligation to perform it, and the failure to perform justified a reduction of the fees charged."

Then counsel sets forth what is purported to be a stipulation, found on page 257 of the record, in which he asserts it is agreed that neither the franchise of either companies, nor their articles of incorporation, make any provision with respect to the pressure at which gas should be furnished or with respect to the quantity which shall be furnished. Counsel, in quoting the purported stitpulation, indicates the length to which he would go in an effort to convince the Court that the company is under no obligation to render efficient service. Such a stipulation as this was suggested but it will be found from the record, page 257, that the stipulation was subject to the approval of counsel for the Corporation Commission, subject to the examination of the franchise, and it is specifically agreed that in case it is so desired a copy of the franchise will be offered in evidnece. After an examination of the franchise, the franchise itself was introduced in evidence, and would certainly therefore be considered as binding insofar as its requirements are concerned (p. 260).

Section 12 of the franchise (R. 262) provides as follows, with respect to the service to be rendered under its terms:

"Section 12. The mayor and council and their successors shall at all times have the power to impose all needful and reasonable regulations for the protection

of the interests of the inhabitants of said city, and among other things shall have the power, after full hearing, to require extensions of service where it can be done without financial loss to the grantee. The grantee may, if it desires, extend its distributing system into any communities or territory outside the limits of said city, and may supply the inhabitants of such cummunities or territory with gas from said system, maintained and operated hereunder."

It will be noted that the obligation expressed in this section is that the service, and as a matter of fact, "all nesiful and reasonable regulations for the protection of the inhabitants of said city" are subject to regulation by the mayor and city council of Oklahoma City. However, aside from this consideration, we again refer to the language of the Supreme Court of the State of Oklahoma and referred to in the decision of this Court in its former opinion, which is sought to be distinguished in connection with general Order No. 1028, of the Corporation Commission, effective April 20, 1916, and found in the Annual Report of the Corporation Commission 1916, page 447, requiring natural gas companies to so construct, equip and maintain their pipe lines, mains and distributing systems in such condition as to be able at all times to furnish an adequate supply of gas for domestic consumption, and requiring *such companies to furnish and supply at all times an adequate amount of the proper quality for heating, cooking and lighting for domestic consumption*, and in

which the court considering said provisions, used the language heretofore quoted *supra*:

> "This order of the Commission is as much a law of the State as if enacted by the legislature, and the parties furnishing natural gas were as much subject to its provisions as if it had been made an integral part of the contract between consumers and parties."

In the same opinion by the Supreme Court of the State of Oklahoma, 78 Okla. 6, *supra*, as has heretofore been quoted, the court says:

> "The power of the Corporation Commission to regulate rates and practices of gas utilities under this act is subject only to limitations imposed by the legislature."

Moreover, in the granting of a franchise, it is a fundamental principle, as it is in all rate regulations, that the rate permitted to be charged is necessarily based upon the rendition of reasonably efficient service as a consideration for the rate fixed, and even though a franchise or charter may not be held to impose an absolute obligation to supply the full demand, neither could they be construed or held to impose an absolute obligation upon the patrons to pay the full measure of payment for service which is unreasonable, inadequate or inefficient.

Third: Under the third head of the attempt to distinguish this case from the former case, the language of the court was quoted, to wit:

"The percentage of reduction and its adequate relation to a deficiency in service were necessarily determined by the Commission from the case as presented to it, and the Supreme Court, upon consideration, affirmed the determination as a just and supported relation."

It is then asserted that in the present case the relation between the discounts ordered and the deficiency in quantity and heat units of the gas furnished, was not pretended to be determined by the commission from the case as presented to it, and that no evidence was offered upon that or any other subject. In reply to this it should be sufficient to refer to the original order of the Commission, of January 10, 1920, entitled, "In the matter of interpreting the charts and determining discounts on bills for gas furnished by the Oklahoma Gas & Electric Co. and Oklahoma Natural Gas Co. in Oklahoma City in accordance with Commission's order No. 1374 and 1599, and Journal Entry Cause 3846 (R. page 9), wherein it is disclosed that the proceeding was instituted, not as in the former case, by the complaint of individual citizens, but by the Oklahoma Gas & Electric Co. itself, the distributing company, who, pursuant to Order No. 1599, of the Commission, voluntarily brought its records, to wit, the charts from pressure regulators located in different parts of the city of Oklahoma City, in before the Commission and asked the Commission to interpret said charts and determine the amount of refunds which should be adjudged as returnable to the

patrons under said orders. These charts and the pressure shown by the charts were the basis of the order of the Commission, requiring refunds, is exactly proportionate to the pressure which had been maintained for the period under consideration. Just how much other evidence counsel would have the Commission consider in addition to the admission throughout the record, without a single exception, that the gas service was inadequate, inefficient and insufficient for the needs of the public in Oklahoma City during the period of time, we are at a loss to understand. The Supreme Court of the State of Oklahoma in its opinion in this case, found that there was no dispute as to the facts, which is true. Indeed, seven eminently qualified and reputable witnesses introduced by appellant all admitted the important fact that the gas service was inefficient and that sufficient gas could not be delivered for the needs of the company's patrons during the period under consideration. In this connection it might be well to refer to the opinion of the Supreme Court of the State of Oklahoma as to these eminent expert witnesses, *Oklahoma Natural Gas Co. v. State*, 236 Pac. 893-894, *supra*, wherein the court said:

> "These expert witnesses were evidently well informed as to natural gas, and some of them, in fact most of them, had been in the employ of different gas companies and mining companies for several years and were able to testify as to the different methods of handling gas, and their testimony was duly consid-

ered by the Corporation Commission before the entering of the order appealed from."

Continuing further:

"While the testimony of these witnesses is interesting from a scientific standpoint, we do not consider it of very much value in determining the case before us. The testimony, like most expert testimony, is highly technical and based largely on experiments and conjecture, *and is such that the average consumer of gas could not understand it, nor apply the methods suggested.* One witness testified to overhauling his cook range so as to make it conform to the plans suggested by these experts and it cost him over $100.00 to adjust his range so as to conform to the methods of handling gas given by these experts. So it will be seen that, while the testimony is very scientific, it is absolutely impractical to apply it to the ordinary gas consumer. This was undoubtedly the view the Corporation Commission took of this testimony."

Indeed, as a matter of fact, no attempt was made at any point in the trial of this cause before the Commission, to disprove the showing made by the charts supplied by the Oklahoma Gas & Electric Co. and which had been kept in conformity to the requirements of the Commission, so as to disclose in the various sections of Oklahoma City, just what pressure was maintained, *not at the burner tip, but at the pressure regulator stations* and which charts reflect the pressure on the mains of the company at the point of location of the regulator, which would be higher and probably very much higher than at the burner tip of the consumer.

As showing the efforts which the Commission did make to determine the relations between normal service and the service actually rendered, we call attention to the order of the Commission itself (R. page 9), which discloses the fact to be that in some districts in the city absolutely no discount whatever was allowed for the portion of the time involved, and that the discounts in other districts were based absolutely on the showing for that district made by the pressure charts, and varied in the various districts from 1 per cent to 25 per cent, according to the pressure charts.

Fourth: Under distinction No. 4, it is asserted that in the former case of *Oklahoma Natural Gas Co.* v. *State*, *supra*, the record contained no showing as to the effect of the discounts upon appellants, while in the present case it is proved and not disputed or controverted, that the established rates, even without discount or reduction, were insufficient to give appellant the earning required to take care of its amortization and depreciation, to say nothing of giving it a reasonable return upon the value of the property, and during said period of time appellant had spent vastly more than the earnings had been in an effort to procure and furnish an adequate supply of gas at the pressure desired. In reply to this we assert that even if true, which we do not admit, this would be no basis for denying the relief to the patrons of the gas company which

the Commission has sought to afford on account of inefficient and inadequate service. Moreover, at the very time of the pendency of this case, there was also pending an application before the Commission for a rate increase at the hands of the Commission, in favor of the Oklahoma Natural Gas Company, which increase was granted, and rates put into effect which nearly doubled that for which the company had voluntarily originally assumed to render service, and as a matter of fact, the rates in effect throughout the major portion of the pendency of this litigation, have been reduced slightly, and the reduction acquiesced in by the company without an appeal or protest.

A comparison of this case with the case decided discloses:

First. The parties are the same.

Second. The exact principle applied in the former case is applied in this.

Third. In each of the proceedings of the commission an appeal was taken from its action to the Supreme Court of the State of Oklahoma where it was affirmed and supported.

Fourth. The undisputed and essential facts are identical, to wit, the failure of the gas company to supply an adequate and efficient quantity of gas at the proper pressure for heating, cooking and lighting for domestic consumption.

Upon these four important elements there is absolute similarity in the two cases. However, there are other very important considerations which, in our opinion, make

this the stronger of the two cases insofar as justification *for* the refunds are concerned. The first is the fact that pending the other case and before the promulgation of the original order in this case, the Commission had by general Order No. 1599, required gas companies to maintain pressure regulators in different portions of the communities served by them, for the purpose of determining the amount of pressure maintained at all times, and had fixed that amount by general Order No. 1599, at a normal pressure of 4 oz. at the regulator station, and it provided that less than 4 oz. should be considered less than adequate or normal pressure, and had worked out the formula upon which the refunds in this case have been made.

The second distinction in favor of the present case lies in the fact that in conformity to the terms and requirements of Order No. 1599, the distributing company, the Oklahoma Gas & Electric Co., appeared and laid before the Commission its pressure charts indicating the amount of pressure which had been maintained during the times under consideration, and invoked the jurisdiction of the Corporation Commission in interpreting the said charts and in determining the amount of refund which it was obligated to restore to its patrons, whereas in the other case individual citizens of Oklahoma City, to wit, Ruth, Selby and Donnell had filed their complaints with the Corporation Commission and necessarily had to bear the

entire burden of the proceeding without the benefit of pressure regulator charts kept by the company.

The records of the two cases will show that every issue raised in the former case and decided against the company in that case, are again raised here.

The Hearing Before the Commission and the Facts Developed.

On page 20 of appellant's brief, he discusses this case under the above head from the gas company's standpoint, beginning with the matter of "The relation between the two companies" and makes the statement that it was agreed at the hearing that the gas was appellant's property and distributed under contract with the Oklahoma Gas & Electric Company as appellant's agent for a per cent of the proceeds, and in the Commission's final order it found that fact to be true. The contract is then referred to as being in the evidence. In reply to this contention it may be suggested that the two companies could in no wise escape the responsibility imposed by law upon a public utility by entering into a contract with some other concern or person with respect thereto.

Chicago, R. & Q. R. Co. v. Iowa, 94 U. S. 155, 24 L. ed. 94.

Louisville & N. R. Co. v. Motley, 219 U. S. 467, 55 L. ed. 297.

Union Dry Goods Co. v. Georgia Pub. Ser. Corp., 248 U. S. 372, 63 L. ed. 309.

Hudson Co. Water Co. v. McCarter, 209 U. S. 349, 52 L. ed. 828.

C. B. & Q. R. Co. v. *McGuire*, 219 U. S.
Atlantic Coast Line R. R. v. *Goldsboro*, 332 U. S. 548, 58 L. ed. 721.
Rail & River Coal Co. v. *Ohio Ind. Com.*, 236 U. S. 338.

The obligation imposed by the franchise and the charters of the company is then discussed, and the statement is then made that it is stipulated in the record that neither the franchises nor the charters or articles of incorporation of either company contain any provision with respect to the pressure at which gas shall be furnished or to the quantity which shall be furnished. As heretofore pointed out, this statement is not borne out by the record in any sense as the stipulation itself, as shown by the record (Abst. 126—R. 2567), shows that either party reserved the right to introduce the franchise for the purpose of showing exactly what was contained therein and that as a matter of fact, the franchise was introduced and does contain the provision heretofore quoted, empowering, in Section 12 thereof, the mayor and council and their successors to impose all needful and reasonable regulations for the protection of the interested inhabitants of said city, including extension of service.

Section 4 of the franchise (R. 261) also provides that should the supply of natural gas available to the grantee fail during the life of the franchise, that the grantee shall have the right to furnish to said city and its inhabitants

artificial gas, and shall have the right to charge therefor not to exceed $1.00 per M cubic feet. It is then asserted that the Commission's previous orders, some of which were referred to in the order complained of, were not made the basis of the tentative order and notice to appellant to appear and show cause why the rebates should not be made. Reference is made to Order No. 1374 requiring refunds upon the same basis of the Nowata County Gas Co. and which has been referred to heretofore.

It is true that the Oklahoma Natural Gas Co. was not a party to the proceeding resulting in that order and should not have been, and the order here complained of was in no wise based upon the order made in that cause, for the reason that that order was directed against a specific company and was merely referred to in the order as a precedent dealing with a similar situation. Counsel then refers to the order or journal entry of December 13, 1919, which he contends was a general order and that no hearing was had before making it as required by Section 18, Art. 9, of the Oklahoma Constitution. The order of December 13, 1919, was in no wise depended upon as a basis for the order now under consideration, and the proceeding had in this cause before the Commission was conducted upon the theory that the company was entitled to a hearing, was given a hearing, and had it not been so counsel could not have been able to refer to the facts which had been developed at the hearing.

Section 18 of Article 9 of the Constitution of the State of Oklahoma, provides that in actions directed at specific individual companies, a ten days' notice of the time and place of said hearing shall be given, but that in general orders directed at all companies of a class or kind, that notice by publication for four consecutive weeks in some newspaper published at the Capitol, shall be required.

There need be no argument made to show that this case now under consideration is directed at a specific company and the record discloses that not only was the ten days' notice given to both the Oklahoma Gas & Electric Co. and the Oklahoma Natural Gas Co., but that both companies appeared, filed their answer (R. pages 15-22) and introduced testimony with respect to the matters and things under consideration.

The Facts Proved.

Under the head of "The Facts Proved" counsel then discusses some of the evidence and furnishes the names of some of the witnesses presented by appellant at said hearing. The statement is made that no evidence was introduced by the Commission. It is true that no witnesses were sworn upon behalf of the Commission or upon behalf of the patrons of the gas company, but the order and notice (R. page 11) shows very plainly that the Oklahoma Gas & Electric Co. instituted the proceeding itself by presenting to the Commission pur-

suant to Order No. 1599 (R. page 11) its pressure charts as required by that order and invoked the jurisdiction of the Commission for the purpose of having the Commission interpret said charts for the purpose of determining the amount of refunds which should be required at the hands of appellant Oklahoma Natural Gas Co. Upon this question we call attention to the colloquy between the Commission and counsel for appellant, found on page 166 of the record, wherein is was made plain that the understanding was that the Oklahoma Gas & Electric Company presented these pressure charts for the purpose of finding out what appellant Oklahoma Natural Gas Co. was going to do in regard to these rebates. The pressure regulator charts presented, disclosed the actual pressure maintained for the period investigated, not at the burner tip as appellant would have the court to understand, but upon the distributing main of the distributing company in the various sections of the city of Oklahoma City. *No reference is made at any place in the record to the pressure which actually existed, during the period of time for which the rebate was made, at the burner tip of the gas patron*, notwithstanding most of the testimony of all the experts was with respect to the amount of gas which could be used for some purpose at the burner tip. It was unnecessary for the Commission or for the gas patrons to introduce any evidence whatsoever. The gas charts, the inefficient service, and the failure of the company to per-

form its function is admitted upon every page of the record and by every pleading filed in the cause. The fact of the inefficient service is admitted; not only admitted but proved by the distributing company, by the presentation of the regulator charts which were used by the Commission in figuring the discounts applicable to the various districts covered by the order.

The vice president of the Oklahoma Natural Gas Co., Mr. J. F. Sharp, testified (R. page 216) upon the adequacy of the supply of gas in Oklahoma City during the period under consideration, as follows:

"Q. The Oklahoma Natural Gas Co. does not contend that there was an adequate supply of gas for all of its patrons during the months of November and December, 1919, I understand?

A. No, sir."

Considerable space is then devoted to a discussion of the evidence with respect to the steps which had been taken by appellant to secure gas for consumption in Oklahoma City and to the diligence which had been used by the company looking to that end. As a matter of fact the testimony of the experts introduced was not intended to deny the inefficiency of the service during the period, but was introduced for the purpose of burdening the record with scientific observations with respect to the conservation of natural gas and with respect to the necessary appliances which should be used at great cost to the gas consumer, in

order that he might be able to burn the company's gas regardless of pressure or regardless of the quantity which might be delivered throughout any given period of time. The great burden of the effort of these experts appears to have been to define the number of heat units in a certain cubic foot of gas under various pressures to which it may be subjected, and to prove that insofar as heat units are concerned, the difference between a cubic foot of gas at high pressure and low pressure, is, according to their statement, inconsequential. It is admitted by every witness produced by the gas company, that regardless of the number of heat units in a cubic foot of gas, service depends upon the number of cubic feet obtainable in a given period of time.

Testimony of Expert T. R. Weymouth.

We call the Court's attention to the testimony of T. R. Weymouth, an employee of one of the big gas companies of the east, who testified as to the heat units contained (pages 114-115 of the record—page 78 of abstract) in a cubic foot of natural gas, but the significance of his testimoney in connection with this cause, as well as the testimony of the other witnesses, is as to the number of cubic feet of gas which may be delivered during a given period of time. Conceding that a cubic foot of gas at half ounce pressure is 98.5 per cent in heat units as compared with a cubic foot at 4 oz. pressure, if the consumer cannot se-

cure a sufficient number of cubic feet during a given period of time he would probably suffer for the lack of fuel for any purpose for which it might be desired. For instance: If he requires 100,000 heat units to supply his needs for efficient heating, and could only procure one cubic foot of gas notwithstanding it might contain 98.5 per cent in heat units as compared with normal service, it can very readily be seen that he would have no service at all.

The testimony of Mr. Weymouth, as well as the other witnesses on this question, is that if upon a 4 oz. pressure a consumer would secure 100 ft. of gas per hour, then on one-half ounce pressure he could procure approximately 35 ft. during the same period of time. He then states that the heating value of the low pressure gas per cubic foot would be 98.5 percent compared with 100 percent at a pressure of 4 oz. By multiplying the number of heat units or the percentage of heat units in the gas at low pressure, by the number of cubic feet, you may ascertain mathematically the proportionate number of heat units obtained at low pressure, and by multiplying the number of feet at 4 oz. pressure by the proportion of heat units into the number of heat units obtained during a given period of time, may also be secured. This process shows upon the theory of Mr. Weymouth, that at one-half oz. pressure the patron would secure 3447.5 heat units and that at 4 oz. pressure, he would secure 10,000. An admission of these facts is found at page 36 of counsel's brief, in the tes-

timony of H. D. Hancock (Abst. page 123, R. 254), wherein he admits that "a consumer will receive more gas in the same time through the same appliance at a 4 oz. pressure than at 2 oz."; and again, "with all conditions the same except pressure, more gas will flow through the line in a given time at a 4 oz. pressure than at any less pressure. The pressure at which gas is furnished, other conditions being equal, is indicative of the rate of flow" (Abst. 123-124, R. 254). Again on the same page this witness states ,"In order that the consumers may have their gas at a 4 oz. pressure when an adequate supply is not available to the company, it is necessary for them (the consumers) periodically to close all their burners and quit burning gas while the company packs the line and builds up the pressure. Then as soon as the consumers light their burners and begin using gas again, inasmuch as the rate of consumption exceeds the rate of supply, the pressure will immediately start down, and the same procedure must be repeated. If the consumers demand a pressure of 2 oz. and the company cannot maintain it, that means that the consumers are demanding a larger quantity of gas than the company can furnish" (Abst. 124, R. 255).

The witness Weymouth admits (R. 114-115, Abst. 78):

> "The trouble is that when gas is scarce and the pressure is low the consumer cannot get as much gas through his lines as he wants and needs."

Again on Record page 115 he expresses the same idea when he was asked the following question:

"Q. So that if he had any complaint to make it would not be that he was not getting in gas and heating units what he was charged with, but that he was not getting the quantity he wanted or needed?

A. That is perfectly true."

In connection with the appliances necessary for the use of low pressure gas, this witness, at page 125 of the record, was asked the following question:

"Q. Is it not true that there are stoves that are designed for eight or from six to eight ounce pressure, and that it is more economical to use those stoves at that pressure than at any other kind of pressure?

A. I don't know for a fact that the stoves were properly designed for such a pressure as that, although there are some stoves that cannot be used under low pressures in their present condition. There is no question about that.

Q. Assuming that stoves are designed for that kind of pressure then it would not be possible to regulate them would it, so as to give satisfactory service from low pressure?

A. There are stoves that cannot be regulated to get the best effect from low pressure, although great improvement can be made in them."

The witness again, on page 127 of the record, admits that the speed at which natural gas enters the mixing chamber of the ordinary stove controls the amount of air necessary to be mixed with the gas to result in perfect combustion, and that it is possible for gas to get weakened out so that it won't pull air in through the mixer to mix properly for efficient burning.

The witness Weymouth (Abst. 80, R. 119) is apparently made to say that the supply of gas the company can furnish is made only by nature and cannot be made by man, and that therefore the company should not be held responsible for inefficient service. However, the witness did not stop with the statement attributed to him in that connection (R. 119), but continued to testify as follows:

"Q. Then to come down to that, the consumer has nothing to do with the supply of gas, that depends on the company?

A. It depends on the way the company operates its property, certainly."

Counsel then sets forth eleven propositions, commencing with No. 1, which is:

I.

The weather and the nation-wide extent of the shortage.

It is conceded that there has been no controversy at any step of this proceeding that the weather was not cold and severely cold during the period of time covered by the rebates required. Neither is it contended that insofar as appellant is concerned particularly, there was not a failure of the supply of gas available for heating, cooking and domestic purposes in Oklahoma City. As a matter of fact, that is the basis of the entire proceeding and was the basis of the order upon which the rebates and refunds required were made.

II.

Appellant's pipe line and compressor facilities for furnishing gas.

There was considerable testimony upon the matter of the facilities possessed by the Oklahoma Natural Gas Company in connection with its business and duty of supplying its patrons with an adequate supply of gas. There was no substantial controversy as to the facilities which had been installed for that purpose.

III.

Appellant's care and diligence to procure and furnish an adequate supply at the pressure desired.

As in the former case decided by this Court, *Oklahoma Natural Gas Co.* v. *State of Oklahoma*, 258 U. S. 234, *supra*, there is no contention that the gas company was especially negligent in its failure to supply the gas required and needed by its patrons in Oklahoma City during the period under consideration. We therefore say that the evidence upon this question, in view of the decision of the Supreme Court of the State of Oklahoma and the decision of the Corporation Commission itself, is entirely aside of the matter in dispute, since it is admitted that the supply of gas was inadequate and that the service was inefficient, and that the patrons suffered by reason of such inadequacy and such inefficiency.

IV.

The supply of gas in Oklahoma had failed and was failing.

There is some proof in the record that the supply of gas from some of the fields which had theretofore been connected with Oklahoma Natural Gas Company lines, had depleted. It is not a fact, however, that the supply of gas in Oklahoma had failed by any manner or means, and as a matter of fact, during nearly all the period of time since the shortage of 1919, there has been more gas available for distribution and consumption to the public than ever before within the history of the state.

V.

Appellant's earnings at the established rates did not give it a reasonable return on the value of its property used in rendering its public service even without discounting its bills.

This contention, we submit, is entirely aside from the question at issue in this cause; if for no other reason, on account of the fact that at the very time of the hearing before the Corporation Commission there was being considered by the company and the commission the matter of the adjustment of rates charged by the company, and as a matter of fact, very shortly thereafter an order was promulgated by the commission in favor of the Oklahoma Natural Gas Company revoking the divisional contract between it and the Oklahoma Gas & Electric Co., under which it had been operating, to the great advantage of that company both as to the conservation of natural gas and

as to the rate charged for this service. Thereafter other adjustments were secured at the hands of the courts and of the commission, the effect of which has been to increase the gas rates charged for service in Oklahoma City as well as in other cities and towns served directly or indirectly by appellant, and by reason of which this company now collects more than 100 percent of the amount which it originally collected under the terms of the franchise and under the terms of the divisional contract entered into between the two companies. In this connection it might be proper to say that the last adjustment of rates was at the hands of the Corporation Commission wherein a gate rate was established for appellant, of 35 cents per thousand cubic feet, from which order and from which rate no appeal was taken to any court but was accepted by the company.

VI.

The pressure at which gas can be furnished is conditioned and limited by the relation between demand and the volume or supply available.

This is merely a repetition, in effect, of proposition No. 3 with respect to the care and diligence to procure and furnish an adequate supply at the pressure desired, and of Proposition No. 4, with respect to the depletion of certain gas fields located within the State of Oklahoma. This same contention was presented vigorously in the case of *Oklahoma Nat. Gas Co. v. State et al., supra*, both in the

Supreme Court of the State of Oklahoma and before this court, and decided adversely to the contention of appellant. Even though this proposition might be conceded, the fact remains, as found by the record and decided by the Supreme Court of the State of Oklahoma and by this court in the cases heretofore referred to, that a consumer of natural gas depends for service upon a sufficient amount of natural gas for his needs. In other words, if there is required a certain number of thousand cubic feet per hour for the comfort and warmth of his residence and for cooking, heating and domestic purposes as is required by the commission's general Order No. 1028, concerning which it has been held that it is as much a law of the State of Oklahoma as it if had been passed by the Legislature, then that patron should not be expected to pay the full price for a quantity of gas which he cannot use and which proved to be entirely inadequate for the purposes for which it is desired. For instance: If he requires 100 cu. ft. of gas per hour in order to keep from freezing, and only receives one-fourth of that quantity, or 25 cu. ft., then he certainly should not be required to pay the full price for that amount which proves entirely inadequate and inefficient for the purpose for which it is desired. In other words, it is service for which the patron obligates himself to pay, and the rate to be charged is based upon efficient service, and when less than efficient service is rendered he certainly should

not be required to pay the rate which has been fixed, based upon such efficiency.

VII.

The discounts ordered bore no relation in fact to the deficiency in the density of and the heat units contained in the gas actually furnished.

Throughout the testimony, and throughout appellant's brief, there is a prolonged discussion of the heat units or b. t. u.'s contained in a cubic foot of natural gas, both under atmospheric pressure and under other pressures in excess of atmospheric pressure. There is no contention in this cause, nor was there any contention before the commission that a cubic foot of gas either at atmospheric pressure or any other added pressure contained any given number of heat units. However, as illustrated herein, it is the number of heat units desired and necessary during a given period of time that is important, rather than the number of heat units that is contained in a cubic foot of gas. If a cubic foot of gas at ½ oz. pressure contains 98.5 heat units as compared with 100 heat units at 4 oz. pressure, then a cubic foot at ½ oz. pressure will lack very little of having as much heat value at ½ oz. pressure, as it would have under a pressure of 4 oz. Certainly as to that there is very little dispute. However, as heretofore pointed out, if it is necessary in order to have sufficient service to secure 1000 cu. ft. of gas containing either 98.5 heat units or 100 heat units, as the case may be, and there

is only available during that stated period of time 350 cu. ft. of gas, then the difference as reflected by the figures heretofore used might be equivalent to the difference between service and no service or the difference between comparative freezing and warmth; that is to say, the consumer at 350 cu. ft. per hour would receive 34,475 heat units, whereas at 4 oz. pressure he would receive the amount which he needed, to wit, 100,000 heat units, and in case the 100,000 heat units was necessary for the comfort, convenience and warmth of the patron or his family, and he only secures 34,475, or less than might be necessary to sustain life, less than service, he therefore should not be required to pay for full service.

Upon this proposition we respectfully call the attention of the court to the testimony of the experts testifying in this cause before the Commission.

Testimony of Samuel S. Wyer.

This witness in connection with the relative quantity of gas which should pass through a meter at the various pressures in a given time (R., page 41), testifies as follows:

"Q. Can you state to the Commission what relative quantity of gas will pass through a meter at those various pressures?

A. I haven't any data prepared; the amount that will pass may decrease as the pressure goes down."

Also on page 41-42 of the record, after the witness had

replied to a question with respect to the effect which opening the gas cock wide open or leaving it half open would have, he was asked the following question by Commissioner Russell and made the following statement:

"Commissioner Russell: That is the condition in common use; as the gas goes down they turn it wide open more and more until we have it wide open as much as we can get and still no results?

A. No results because you do not use the gas properly. If you will use the gas properly in the appliances for using it, either to heat with or for cooking, you can get not only as good but better service at low pressure than you can at high. It is especially true in connection with the operation of the ordinary cooking range. That range, if properly adjusted, and by properly adjusted I mean an adjustment that can be easily made by the ordinary housewife, will cook with less gas at one half ounce pressure than the four ounce pressure as ordinarily used. In the heating stove you have this situation. *That there is no adjustment that you can make that will give you any more heat.* When you have burned the gas with proper combustion you have gotten all the heat that you can get out of it. If you will utilize that in the right sort of device, you can get the same efficiency, that is, the same ratio of input and output at one pressure as another. *However, what happens with the heating stove is that there is not enough gas to go around and for that reason the public complains because the operating conditions are such that in extremely cold weather as at the present time, it is impossible to take care of that big load.* That condition will become more acute each year. However, so far as cooking is concerned, the load is practically uniform, and en-

tirely satisfactory operations can be carried on with very low pressure and meals can be cooked with the pressure as low as three-tenths of an inch water pressure, which would be equivalent to about fifteen one-hundredths of an ounce (.15 oz.).

Mr. Richardson: Now I want to make this clear. That when we were discussing the relative quantity of gas contained in 1,000 cubic feet at different pressures, we were not discussing the quantity that the meters would deliver at the various pressures, *but we were merely discussing the contents of the gas actually delivered.*

A. The relative heating contents at the different pressures. I have a table that I shall put in evidence later to prove up the condition which shows that a service consuming 100 cubic feet of gas an hour at a four ounce pressure would receive gas approximately as follows when the pressure carries:

4 ounces, 100 cubic feet per hour.
3 ounces, 86 cubic feet per hour.
2 ounces, 71 cubic feet per hour.
1 ounce, 50 cubic feet per hour."

The witness Wyer (Abst. 56, R. 72 73) refers to a bulletin issued by the University of Kansas on July 1, 1912, entitled "Natural Gas, Its Properties, Its Use, And Its Measurement by Meters." An extract from this bulletin is found on page 56 of the abstract, in which the witness admits the difficulty experienced by consumers during low pressure periods in the following language:

"The real invariable loss in the values of the gas at low pressure arises from the fact that the highest value cannot be utilized with the same efficiency as at the higher

pressure. The most serious result of the company's inability to maintain a pressure of four inches of water or more is that a sufficient amount of gas *cannot be drawn from the line* through the standard mixer and burner. The consumer gets practically all they pay for, and are able to utilize it 95% as effectively as when the pressure was high, but they cannot get all that they need. If high pressure was maintained, more gas would be used and the bills would be higher than they will with low gas under present conditions, but if the consumer got all he needed for comfort he would be more content to pay the larger bills."

This same witness on page 74 of the record (Abst. 57-58) refers to the necessity for high gas rates in order to conserve the supply of natural gas, and take the position that the conservation depends to a great degree upon the price which the consumer is required to pay for the gas at the burner tip. He says:

"The only way that you will ever get adequate service is to make the gas worth conserving, and the only way you can get the consumers to pay increased prices without vigorous protest is to show him how he can pay a much larger price per thousand without any increased annual cost."

In reply to this statement Commissioner Walker makes the following observation:

"Take this town for illustration. Suppose we would say the price of natural gas is $1.00 per thousand in Oklahoma City. How is that going to do any good when in the southeast part of town the gas goes out entirely?"

The witness then answered:

"For the simple reason when you make gas $1.00 per

thousand in Oklahoma City, every consumer will have some real incentive to raise the burners on his stove and to put in efficient applicances, and when he does that you can get one foot of gas to do the work of three. Therefore, raising the price would have the practical effect of making three times more gas available because we could get the same cooking, heating and lighting service if efficiently used with one third the amount of gas, and yet at the higher price per thousand feet their annual cost would be substantially no more. I agree with you absolutely, you cannot separate the matter of service and rates. The two must go hand in hand."

In this admission the witness assumes exactly the same position which the Supreme Court of the State of Oklahoma in its decision referred to, *supra*, has taken with respect to the adjustment of charges for service during the periods when the gas pressure is so low as to not secure to the patron the quantity of gas necessary for cooking, heating and lighting for domestic purposes. This is true for the reason, as stated by the Supreme Court of the State of Oklahoma, that in establishing gas rates the Commission fixes the final rate to be applied based upon normal and efficient service. This normal and efficient service is the basis of the rate which should be charged and the amount to be collected from the patron; then certainly in a case of less than efficient service and in case of less than normal efficiency at the burner tip, the full rate fixed, based upon efficient service, should not be collected.

The witness (page 71 Abst.—R. 89-90) discusses the

different amounts of gas necessary for use in domestic consumption for heating and cooking in the summer time as compared with that which is required in the winter time. He observes that the cooking process usually starts with the heating of a given amount of water; that the temperature of the water in summer will be 30 or 40 degrees higher than in the winter and that therefore considerable more heat would be required in the winter time than in the summer time; that a good deal of gas must be burned in the winter to bring the water to its normal temperature in the summer. He then adds also that the radiation loss in the winter time when the kitchen is cold is very much larger than it is in the summer time; that if the consumer desires to heat his house in the spring, the temperature is already about 50 degrees, and as he only wants to bring it to a temperature of 70, he has to raise it 70 degrees in the winter time as against 20 degrees in the spring; all of these observations amounting only to a confession of the inability or the failure upon the part of the gas company to supply that quantity of gas desired and necessary for human consumption in the winter time and upon which the rate charged is necessarily based.

Testimony of Miss Olga Elifritz.

The witness Elifritz (R. 58, Abst. 46), testifies to the effect that with the ordinary housewife the greatest waste and the most dissatisfaction has come from three factors: First, she has never been taught how to use natural gas.

It is the only commodity which is delivered to us in a state in which we cannot use it. It must first be properly mixed with air, then it must be correctly burned, and the heat derived from it must be properly directed; the second factor is inefficient appliances; the third is dirty appliances. In this connection it is interesting to note that practically all the witnesses admit that the ordinary housewife or user of gas possesses no knowledge as to the proper adjustment of gas appliances so as to secure the efficient results testified to by the experts when the pressure is as low as the testimony in this case indicates and which is not disputed. This witness devoted a considerable portion of her testimony to the technical discussion of the adjustment of gas ranges which is necessary in order to secure efficient results from low pressure service (Abst. 49, R. 58, 59, 60). During this testimony (R., page 62), Commissioner Russell propounded the following question:

"What is the ordinary pressure ordinarily used in this town in the ordinary stove, in cooking, if you know?"

to which the witness answered:

"A. I cannot answer that. You will have to ask the manager of the Gas Company that question. He will probably be able to produce his records. I have no information as to what pressures are available here."

She then testified (R. page 63):

"*With efficient appliances and with the flame prop-*

erly directed, I would say you can cook a satisfactory meal with two ounce pressure.

"Commissioner Walker: For all purposes?

"A. Yes, sir."

Testimony of Bert C. Oliphant.

Bert C. Oliphant, President of the Iroquois Natural Gas Company, president of the Erie County Gas Company and vice president of the Provincial Natural Gas & Fuel Co. of Ontario, Canada, and whose testimony is set forth in the abstract at page 83, states that a meter will deliver more gas at high pressure than at low, and that a meter will not run as fast if the gas is passing through at only 1 or 2 ounces as it will if the pressure is 4 or 5 ounces (Abst. 83, R. 140). This witness states (R. 141) that he attempts to maintain a 4 oz. pressure on the lines of the companies operated by him. He also states that he does not entirely agree with Mr. Wyer as to the adjustment of appliances and thereby secure efficient service from gas at low pressure. He further testified (R. 141) that in the cities and towns served by him he receives 35 cents per thousand cubic feet for gas distributed to consumers.

Testimony of Harry D. Hancock.

This witness is employed by the Henry L. Doherty Company, which is engaged in the transportation and distribution of natural gas. His testimony is with respect to the heat units contained in a cubic foot of natural gas as

testified to by Mr. Weymouth and the other witnesses. He was asked (Abst. 86, R. 150) as to whether or not the same quantity of gas will pass through a meter in less time at high pressure or at low pressure, and answers that it will depend upon the opening at the outlet of the meter, but that if the opening is constant, the meter receiving the gas at high pressure will pass more gas than at low pressure. He testifies (Rec., p. 155) that it will take approximately three times as long for a given quantity of gas to be secured at one-half ounce pressure as it would take the same quantity of gas at 4 oz. pressure, and that under 4 oz. pressure 1,000 cu. ft. of gas may be secured in a given time; that under $1\frac{3}{4}$ oz. pressure approximately 600 ft. in the same time, and that under $\frac{1}{2}$ oz. pressure only 350 ft. could be secured in the same length of time, and that the more heat units you have the more heat you get, and that you cannot secure the same service from gas flowing 600 ft. during a given time as compared with a pressure that would deliver 1,000 cu. ft. during the same time.

Testimony of Edwin DeBarr.

Dr. Edwin DeBarr (R., page 160), testifies that a gas meter registers faster at high pressure than at low pressure, because it takes longer for the same amount of gas to pass through the meter at low pressure than it does at high pressure. He testifies that so far as he is personally concerned (R. 162) he cannot get efficient service from gas supplied at less than 2 ounces.

Mr. Ed. Connors.

This witness was not present before the Commission, neither was his deposition taken in the manner provided by law, but a series of questions propounded by him and the answers thereto were introduced in the record over the objection of counsel representing the state. However, the witness admits (R. 164, Abst. 80), that a meter properly regulated and adjusted will correctly measure the number of cubic feet of gas passing through during any given length of time, but that it would take a cubic foot of gas at a lower pressure longer time to pass through the meter than a cubic foot of gas at a higher pressure, and in response to question 17 (Abst. 92, R. 165), he states that as fixtures are usually adjusted, there is a loss in efficiency on account of low pressure, and also states that meter readings are high during low pressure periods owing to the fact that the low pressure itself is evidence of an extreme drain upon the supply.

J. F. Owens.

This witness admits (Abst. 107, R. 190), that during the winter of 1919 there was a severe shortage of natural gas for heating, cooking and other domestic purposes in Oklahoma City. This witness also testifies (R., page 202), as to the work necessary to be done and the amount of money necessary to be expended to change his ordinary gas burning facilities so that he might be able to burn, as he says, efficiently low pressure gas. He also testifies as

to the approximate cost of the work done under the supervision of an efficiency expert, which amounted to something like $100.00.

Testimony of W. A. Wadsworth.

This witness' testimony commences at R., page 103, and abstracts of same are found at pages 74-75 of the abstract. He limits his testimony with respect to the use of low pressure gas, to cooking purposes, and merely states that in Wichita he attempts to give service at 2 oz. pressure. With respect to lower pressure than 2 oz. he states that there are a number of cases where the burners and equipment have been adjusted efficiently to such an extent that they burn gas satisfactorily under 1 oz. This witness is district manager of the Kansas Gas & Electric Co. of Wichita, Kansas, and as indicated by the record throughout as to other witnesses testifying in behalf of appellant, is directly interested as an employee of a gas company in assisting appellant in its contention before the Commission.

VIII.

A Pressure Ranging From 1 3-4 Ounces to 2 Ounces Actually Will Give Better Service Than Will Any Pressure Above That if the Consumers' Burners and Appliances Are Properly Adjusted, and an Arbitrary Requirement That 4 Ounces Be Maintained Makes for Waste and Perpetuates Bad Service.

As has been stated heretofore, counsel and his witnesses throughout the case, have discussed pressure at

the burner tip. All that the Commission has done is to require a given pressure upon the gas mains of the distributing company. A 4-oz. pressure at the regulator station on the mains might not amount to more than 2 oz. at the burner tip, or it might amount to less than 2 oz. at the burner tip. There is no testimony or proof in this record tending to show what the pressure would be at the burner tip under any of the pressures required by the Commission's General Order No. 1559, which was applied in this cause and used as a basis for refunding.

It is said that if the gas is properly used in proper appliances for either heating or cooking, the consumer can get good service at a low pressure. Upon this question, however, it is interesting to note the testimony of the experts with respect to just what character of appliances are necessary in order to secure this efficient service at low pressure.

The vice-president of the distributing company in Oklahoma City, Mr. J. F. Owens, testified with respect to what was necessary in order to adjust his appliances in order to secure that efficiency necessary for the consumption of low pressure gas (R. 202). He testified that it was necessary for him to expend approximately $125 or $130 and engage a gas efficiency expert to supervise the installation of the equipment, in order that he might use efficiently natural gas at a pressure of about 2 oz. In all

probability it would be necessary to have a pressure at his regulator station in his community of not less than 4 oz. even in that case. Counsel for appellant, himself, also places in the record in the form of testimony, his own experience in the installation of high-class appliances and in installing devices with which he might burn low pressure gas. His witness, the high-powered efficiency expert, Mr. Naylon, testified that he was called to the home of Judge Richardson and that he made recommendation with respect to certain improvements looking to the installation of equipment necessary to be installed in order that he might consume low pressure gas efficiently. He recites the things which he found necessary to be done in that connection. The total cost of this installation, as shown by the record, was in excess of $100. This same witness, Mr. Naylon (R. 213), in response to cross examination as to what would be necessary to raise the efficiency of the appliances of the assistant attorney general, to that degree where low pressure gas might be efficiently used, testified that it would cost approximately $100, and that, too, without the changing of any pipe or the installation of the thermostat which counsel, Mr. Richardson and Mr. Owens, the vice-president of the Oklahoma Gas & Electric Co., had installed in order to secure these favorable results.

The testimony of all the witnesses, without a single exception, is to the effect that in order to utilize gas at a lower pressure than 2 oz. at the burner tip (not at the

regulator) it is necessary to install highly efficient stoves, ranges, furnaces other than the ordinary stove range or other appliance ordinarily used by the ordinary citizen.

The order of the Corporation Commission, as this Court well knows, as well as all statutory and legal requirements, are made to apply to the ordinary man under the ordinary existing circumstances. Gas rates are established by regulatory authorities for the ordinary consumer at the burner tip. The Commission, in establishing gas rates, does not take into account high-priced, highly efficient and unusual appliances in arriving at its conclusions, but bases the rate upon the condition which it knows to exist, and upon the circumstances and in connection with the appliances which it knows are being used by those who are affected by the rate to be charged. No reasonable body would require the public, without notice, without sufficient requirement, to make such expenditure as the record discloses to be necessary in order to equip their residences with such appliances for efficient use of extremely low pressure gas as some of these experts contend should be done. As a matter of fact, the gas companies rendering service in Oklahoma City, as well as in other parts of the country, themselves are largely responsible for the very equipment and the very appliances which are being used by the public and through which they distribute gas for public consumption. This is true, for the reason that the gas companies themselves usually have a

mercantile department or supply department, which handles gas stoves, ranges, furnaces and other appliances which are largely used by the public in connection with the service which they render.

No attempt has been made by any gas company in the State of Oklahoma, and there is no contention in this record that any attempt has been made to secure any standard of efficiency in gas burning appliances whatsoever. What it takes to constitute proper fixtures might be a question of considerable dispute as between the experts themselves. The expert Miss Olga Elifritz conducted a demonstration by which she managed to fry an egg on less gas pressure than 2 oz. It is common knowledge, however, that an egg might be fried at a very low temperature in a great number of different ways other than by the employment of highly efficient and costly equipment installed for that purpose. As a matter of fact, an egg might be fried in a thin pan, over an ordinary old-fashioned kerosene oil lamp. In this connection we call attention to the fact that highly paid expert witnesses who have a personal interest in the outcome of any given controversy, have not always been considered as resulting in the most satisfactory testimony. This has been commented upon by the courts, and this Court in the case of *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 53 L. ed. 371, refers to "That most unsatisfactory evidence, the testimony of expert witnesses employed by the parties."

This is also referred to in the case of *Kings County Lighting Co. v. Lewis*, P. U. R. 1920-D, 145, where the court said:

> "The unsatisfactory character of so-called expert opinion on the valuation of a hypothetically reproduced plant at a given time, must be apparent to every one who has had experience with that kind of testimony."

IX

In Gas Service Efficiency is More Nearly Dependent Upon the Consumer Himself Than in Any Other Public Service.

Efficiency of all kinds of public service, no doubt, to a certain extent depends upon the manner of use of the particular thing which is being served. This is as true, and probably more than true of gas service, than of other character of service. However, there is no proof in this case whatsoever that there was any negligence upon the part of any of the consumers of gas in Oklahoma City or any lack of solicitude upon the part of the gas user in connection with his desire for efficient service at the hands of the company. The installation of equipment, including service pipes, meters and other devices used in connection with gas service in Oklahoma City as well as in other towns and communities of the country, is regulated by city ordinance and by certain standard of requirement. There is no contention in this cause that there was any failure upon the part of the consumers of gas in Oklahoma

City as to full compliance with all the requirements made necessary by such regulations. It is not contended by appellee that a man can procure or secure a sufficient amount of gas through a pipe which will not transport that quantity. However, the testimony in this case fully discloses that the question of the size of pipe and the question of the amount of pressure applied to the pipe, are relative, and that if the necessary pressure upon the lines is maintained, then it would not be necessary to have as large house pipes as when the pressure is low at given periods of time. The testimony shows, and it could not be disputed (Abst. 94, R. 184), that in low pressure periods, such as under consideration at the present time, larger pipes, instead of being a benefit, would really deplete the quantity in the mains much more rapidly than smaller pipes, and would therefore, instead of being a benefit, be a detriment, since it is pressure upon the mains which is required by the order of the Commission, *and not pressure at the burner tip.*

Reference is made at page 47 of the brief, under this proposition, to the fact that not 25 per cent of the houses in Oklahoma City are properly piped. In reply to this it is only necessary to repeat that the order of the Commission does not require any given pressure at the burner tip. In other words, the fact of improper house piping would have no relation whatsoever to the matter now before the Commission, for the very simple reason that the

order of the Commission is with respect to the pressure at the regulator station on the mains of the company as disclosed by the pressure regulator charts.

X.

Despite the Gas Companies' Earnest and Continued Efforts to Teach Their Patrons the Proper Adjustment of Their Appliances and the Method of Utilizing Low Pressure Gas, the Latter Had Remained Wilfully Ignorant of the Matter.

This is indeed a serious indictment of the citizens of the city of Oklahoma City. Reference is made to the fact that this has been true in other cities and towns also, and this is therefore an indictment of the general public. If the examples of the cost of efficiency set by J. F. Owen, referred to heretofore, and counsel for appellant in this cause, and the testimony of Mr. Naylon, efficiency expert, are to be taken as a criterion, then the public probably is fortunate in not being more responsive than they have been to the attempts of the gas company to force them to purchase high priced mechanical devices and appliances in order that they might conserve (according to Mr. Wyer) the gas of the gas company for future distribution.

It is said by counsel, on page 49 of his brief, that so long as the public can get plenty of gas at high pressures, they care nothing about conservation or the efficient use of it. The State of Oklahoma and the Corporation Commission of the State of Oklahoma have been as diligent in

connection with the conservation of natural gas, to the end that the public may enjoy an extended use thereof, in our opinion, as has any other interest within this section of the country.

XI.

It is contended under Proposition 11, that

The Commission's Order Requires that Discounts or Rebates Be Given to Hundreds of Consumers Whose Entire Bills were Incurred Only When Gas Was at Normal Pressure.

This proposition is not at all borne out by the testimony. In the first place, the Commission's Order only related to domestic consumption and did not require any refunds to others than the consumers of gas for domestic purposes, to wit, lighting, heating and cooking in residences. Counsel takes the various districts which are used by the Commission in its order, and refers to them in their order. However, it will be found that his witness, Mr. Crutcher, in response to questioning, admitted that his testimony was merely an estimate and that it would be impossible to ascertain the facts with respect to any person in case there be such, who would not use gas during the period in question, and that it would be impossible for him to produce a record with respect thereto.

Testimony of W. H. Crutcher.

The witness W. H. Crutcher, Superintendent of the distributing company in Oklahoma City, in his testimony with respect to the size of pipes (R. 167, 168, 169, 170, 171,

172, 173, 174, 175, 176, 177, 178, 179; Abst. 92, 93, 94, 95) supplying residences within Oklahoma City and the necessity for larger pipes in cold weather as compared to the pipes which are sufficient in warmer weather admitted that by increasing the size of the pipes when the pressure on the main lines of the company was insufficient, would only drain more gas from those lines, and would thus reduce the pressure to a minimum quicker than by the use of smaller pipes. He also admits that the consumer with a large pipe would have an advantage over a consumer with a smaller pipe, and that therefore the installation of larger pipes would merely take the gas out of the mains faster and more rapidly reduce that pressure on the mains which is necessary to render efficient and satisfactory service (R. 184-185).

The gas company offered no evidence or proof that the rebates required in the various districts would result in repayment to any consumer who was not affected by the shortage of supply under consideration. At page 50 of counsel's brief, the proposition is asserted that the Commission's order requires that discounts or rebates be given to hundreds of consumers whose entire bills were incurred only when gas was at a normal pressure. It is then stated that in various districts and subdivisions of Oklahoma City that there were consumers during the period of low pressure who did not use gas, but used coal or other fuel for

heating purposes, and only consumed gas for cooking uses. Reference to pages of the record are made as supporting this proposition. However, at page 182 of the record it is found that Commissioner Russell interrupted the witness Crutcher with the following statement:

"Commissioner Russell: Before you pass on this point I would like to ask a few questions on this line. You state in this district east of the Santa Fe you were asked about, first, that five or ten per cent of the people there are equipped to use, and you believe did use, coal during periods of low pressure, either coal or some other fuel.

A Yes, sir.

Q What percentage of the people in that district have paid their bills without protest?

A I could not say that.

Q Can you furnish them to the Commission? Do you know anybody in that district who, during the periods of low pressure, used coal or some other fuel than gas, and who is now claiming a rebate?

A As to their claiming a rebate, I know absolutely nothing. I have nothing to do with the collection of the bills and have not the remotest idea of what percentage of bills have been paid or protested.

Q Then you are not able to state, I take it, any party in any of these districts who was equipped to use and did use other fuel during low pressure periods and who has demanded a rebate on his gas bill?

A As applying to the whole of these districts?

Q Yes, do you know of anybody in any one of these districts who did not use gas during low pressure and yet has demanded a rebate?

A. At this particular instant I can answer by saying I do know of individual cases in practically all of those sections I have outlined that were prepared to and did use coal during the time of low pressure. As to whether they have demanded a rebate, I cannot say.

Q. Will you furnish to the Commission, as a part of the record, the percentage of the users in each of those districts that you outlined who have claimed their rebate on account of low pressure, and the percentage of those who have paid their bills without protest?

A. I suppose it would be possible to give the figures. I expect I could get that from the auditor's department. The auditor's department should be able to tell how many or what percentage have paid their bills. But as to those that had claimed rebates, I don't see how they could arrive at that, unless they were to assume that failure to pay the bill during the discount period would be an indication of their intention to claim a rebate.

COMMISSIONER RUSSELL: I would assume they were holding back on account of rebates.

COMMISSIONER WALKER: Would not the fact that a number of people have asked you for a discount and a re-billing be an indication that they expected you to rebate them?

A. Yes, I expect there were quite a number of them.

COMMISSIONER WALKER: I think you can check back—

A. It would only be an estimate at best.

COMMISSIONER RUSSELL: Yes, this is only an estimate.

A. I know, but when a party asks for a re-billing, and claiming a rebate, they would be told the matter was in the hands of the Corporation Commission and no rebate would be given until the Cor-

poration Commission so ordered, and the party would go away and either pay his bill as it was or hold it in abeyance.

COMMISSIONER RUSSELL: Will you furnish to the Commission the names of every consumer of gas on your lines who was equipped to use and did use, during the period of low pressure, other fuel than gas and who used his gas at four ounces or more pressure and who has asked for a rebate on low pressure?

MR. RICHARDSON: I think that is impossible.

COMMISSIONER RUSSELL: I think so myself, because I don't think there are any."

And again, on pages 299-300 of the record:

"MR. RICHARDSON: It would cost us five times as much to get that information and make a showing as the rebates would amount to. We have patrolled the business part. We did not patrol the other. This is just an estimate of that. I say it must be determined by the legal effect of this order and it must be tested by its legal effect. I say that without proof at all that there is a single person that did do that, if it is possible that it could be done and that people could come up and claim and get the rebate who did not use gas during that time and whose bill was incurred under normal pressure, then that would render the order bad and we are not required and the burden cannot be cast upon us to go around and show and find out what every person burned.

COMMISSIONER RUSSELL: That has not been asked. But it has been asked that if you do have knowledge—not asking that you take your time to go out and hunt and investigate, but you say you have been patrolling that district, and in patrolling the district and collecting the bills if you have

found any person who was not using gas during that period of low pressure and who is claiming a rebate that would strengthen your own testimony as showing that it was being done."

SPECIFICATIONS OF ASSIGNED ERROR.

Counsel for appellant sets forth numerous specifications of error in this appeal, which he indicates he intends to urge as a basis for relief in this cause, but in his brief contents himself by setting forth and insisting upon only two of said specifications, to wit: Specification No. 2 and Specification No. 5. These two specifications are set out on page 55 of the brief and are as follows, to wit:

(2) "The Supreme Court of the State of Oklahoma erred in deciding, holding and adjudging that the order of the Corporation Commission of the State of Oklahoma appealed from does not deprive appellant of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States."

. . . . . .

(5) "The Supreme Court of the State of Oklahoma erred in failing and refusing to hold and adjudge as prayed by appellant, that the order of the Corporation Commission of the State of Oklahoma appealed from, operates to deny appellant the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States."

Notwithstanding the fact that it is stated that appellant intends to urge these two specifications and assignments in his argument, counsel proceeds to entirely

depart from said assignments and specifications and under the head of "Argument and Authorities" does not refer to either of the propositions as stated by him at any portion of the brief devoted to argument and the submission of authorities. Instead, he sets forth seven propositions which had already been thoroughly covered in the brief, and takes them up one by one and discusses them.

ARGUMENT AND AUTHORITIES.

1.

Under this proposition it is asserted that,

"The Order and its affirmance deprive appellant of its property without due process and deny appellant the equal protection of the law in violation of the Fourteenth Amendment for the reason that the order is based upon no finding purporting or pretending to authorize or justify the same, though by the Oklahoma Constitution such finding is essential to the validity of such orders, and is required by the State Supreme Court as to all other persons, companies and corporations similarly situated."

The authority possessed by the Corporation Commission of the State of Oklahoma with respect to the service, facilities and conveniences at the hands of public utilities and public service concerns, is found at Sec. 18 of Art. 9 of the Constitution of the State of Oklahoma, and reads as follows, to wit:

> "The Commission shall have the power and authority and be charged with the duty of supervising, regulating and controlling all transportation and transmission companies doing business in this state,

in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations and requirements, the Commission may, from time to time, alter or amend. All rates, charges, classifications, rules and regulations adopted, or acted upon, by any such company, inconsistent with those prescribed by the Commission, within the scope of its authority, shall be unlawful and void."

The provision with respect to the notice required to be given and with respect to the evidence taken, objections offered and hearing held, are also found in Sec. 18 of Art. 9 of the Constitution, and are as follows, to wit:

"Before the Commission shall prescribe or fix any rate, charge or classification of traffic and before it shall make any order, rule, regulation or requirement directed against any one or more companies by name, the company or companies to be affected by such rate, charge, classification, order, rule, regulation or requirement, shall first be given by the Commission at least ten days' notice of the time and place, when and where the contemplated action in the premises will be considered and disposed of, and shall be afforded a reasonable opportunity to introduce evidence and to be heard thereon to the end that justice may be done and shall have process to enforce the attendance of witnesses. * * *."

The provision of the Constitution with respect to the

record which shall be made and certified to to the Supreme Court of the State of Oklahoma on appeal from actions taken by the Commission is found in Section 22 of Art. 9 of the Constitution and is as follows, to wit:

> "In no case of appeal from the Commission shall any new or additional evidence be introduced in the Supreme Court, but the chairman of the Commission, under the seal of the Commission, shall certify to the Supreme Court all the facts upon which the action appealed from was based and which may be essential for the proper decision of the appeal, together with such of the evidence introduced before, or considered by, the Commission as may be selected, specified and required to be certified by any party in interest, as well as such other evidence so introduced or considered as the Commission may deem proper to certify. The Commission shall, whenever an appeal is taken therefrom, file with the record of the case and as a part thereof, a written statement of the reasons upon which the action appealed from was based, and such statement shall be read and considered by the Supreme Court, upon disposing of the appeal. The Supreme Court shall have jurisdiction, on such appeal, to consider and determine the reasonableness and justness of the action of the Commission appealed from, as well as any other matter arising under such appeal. Provided, however, that the action of the Commission appealed from shall be regarded as *prima facie*, just, reasonable and correct; but the court may, when it deems necessary, in the interest of justice, remand to the Commission any case pending on appeal, and require the same to be further investigated by the Commission, and reported upon to the court (together with a certificate of such additional evidence as may be tendered before the Commission by any party in interest) before the appeal is finally decided."

In the present case there can be no question as to the Commission's jurisdiction over the appellant with respect to the rates charged and the service rendered to the public in Oklahoma City. There can be no question as to the sufficiency of the notice given to appellant of the time and place of the hearing that was to be conducted with respect to the service which had been rendered during the period of time under consideration. There can be no question but that appellant had every opportunity and was afforded every privilege known to the law with respect to the securing of its witnesses and the introduction of all the testimony which it desired to introduce before the Commission in said hearing. In this connection it should only be necessary to say that not only in the original hearing was appellant accorded every right with respect to a full hearing, but that even after the case had reached the Supreme Court of the State of Oklahoma and had rested there pending the determination in the case of *Oklahoma Nat. Gas Co. v. State of Oklahoma*, 258 U. S. 234, *supra*, for some two years, the Supreme Court upon application of appellant remanded the cause back to the Corporation Commission for the purpose of taking additional testimony and appellant did actually offer a number of witnesses, most of whom were the same witnesses used at the former trial of the case.

Counsel sets out at page 58 of his brief that the Okla

homa Constitution, as construed by the Supreme Court of the State, provides as an essential part of due process of law in proceedings before the Commission, that the Commission shall make findings of fact and that the facts found shall be found adequate to support and justify the order made, and that as to all other persons, companies and corporations situated like appellant, the Oklahoma Supreme Court has held the orders of the Commission invalid, unless the findings of fact made were adequate to support the order or unless an omitted finding was supplied by the evidence.

Counsel then cites, in support of his statement, the cases of *Kansas City Southern Ry. Co.* v. *State*, 27 Okla. 806; *Atchison, T. & S. F. Ry. Co.* v. *State*, 27 Okla. 820; *St. Louis & S. F. Ry. Co.* v. *Newell*, 25 Okla. 502; *Chicago, R. I. & P. Ry. Co.* v. *State*, 24 Okla. 370; *Pioneer T. & T. Co.* v. *Westenhaver*, 23 Okla. 226; *St. Louis, I. M. & S. Ry. Co.* v. *State*, 28 Okla. 372; *Chicago, R. I. & P. Ry. Co.* v. *State*, 83 Okla. 161. However, a reading of the cases cited and a comparison of the facts involved in said cases, reveals the fact that none of them are at all controlling or ruling in the case now before this Court. This is true, for the reason that each one of the decisions cited involve a requirement at the hands of the Commission of the installation of additional services rather than the performance of service by the facilities already existing. For in-

stance: In the case of *Kansas City Southern Ry. Co.* v. *State*, 27 Okla. 806, the Commission had ordered the railway company to install telegraph service for the sole purpose of bulletining trains, without the introduction of any evidence as to the extent of either freight or passenger service of the railway line involved, or as to the necessity for such additional service, but wherein the testimony actually showed that the expense to the company at the various stations involved would be increased 100 per cent. The other cases cited were all cases where additional facilities were ordered and in which the Supreme Court found that the evidence supporting the positive requirement of the installation of additional facilities was not sufficient upon which to base the order. The difference between those cases and the case now before the court is that the order now under consideration has to do with the failure of the company to render that normal and reasonably efficient service which is necessary and upon which the rates to be charged for said service is based, whereas in the cases cited by counsel the Commission was, without increasing rates or taking into consideration the additional expense incident to the added service, requiring the companies to add additional facilities to that which had theretofore been used in the rendition of the service. The distinction is apparent. In the cases cited, there was sharp conflict with respect to the necessity for the additional facilities. There was nothing agreed to. In this

case the essential fact of inefficient service is admitted throughout.

Counsel then compares the cases of *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88, and *Wichita R. & L. Co.* v. *Public Utilities Comm.*, 260 U. S. 48. The first of these cases had to do with an order of the Interstate Commerce Commission, which had been annulled by a decree of the United States Commerce Court. However, the court in this case, in deciding same, used the following language, which appears to be incompatible with the position taken by counsel and the purpose for which the case is cited:

> "The order of the Commission restoring a local rate that had been in force for many years and making a corresponding reduction in the other rate, was not arbitrary but sustained by substantial, though conflicting, evidence. *The courts cannot settle the conflict nor put their judgment against that of the rate making body.*"

In the case of *Wichita R. & L. Co.* v. *Public Utilities Com.*, 260 U. S. 48, there was involved the abrogation of a contract between two companies without findings as to the reasonableness or unreasonableness of the terms of the contract. Nothing of that character is involved here.

The Supreme Court of the State of Oklahoma, in deciding this case (*Okla. Natural Gas Co.* v. *State*, 110 Okla. Rep. 297, 236 Pac. 893), passed upon this identical con-

tention unfavorably to appellant in the following language:

> "It will be observed that the Constitution of Oklahoma makes the findings of fact by the Commission *prima facie* just, reasonable and correct. The Commission found that equitable distribution of loss arising from poor and inadequate service, as between the gas companies and the consumers, could be arrived at by discounting the bills for service rendered each month on the basis outlined in said order, and after quite an extensive computation based upon the evidence, the Commission arrived at the conclusion stated in the order hereinbefore set out."

The court then proceeds to quote the language used by the Oklahoma Supreme Court in *Oklahoma Natural Gas Co.* v. *State*, 78 Okla. 6, *supra*, where it is said:

> "The question is whether there is evidence in the record to support the Corporation Commission's order. Findings of fact made by the Commission are by Sec. 22, Art. 9 of the Constitution, *prima facie*, just, reasonable and correct. *Atchison, T. & S. F. Ry. Co.* v. *State*, 23 Okla. 510, 101 Pac. 262; *Atchison, T. & S. F. Ry. Co.* v. *State*, 23 Okla. 210, 100 Pac. 11, 21 L. R. A. (N. S.) 988; *St. Louis & S. F. Ry. Co.* v. *Travelers Corp. of Okla.*, 47 Okla. 374, 148 Pac. 166; *Guthrie Gas, Light, Fuel & Imp. Co.* v. *Board of Ed.*, 64 Okla. 157, 166 Pac. 128; *City of Pawhuska* v. *Pawhuska O. & G. Co.*, 64 Okla. 214, 166 Pac. 1058; *Muskogee Gas & Elect. Co.* v. *State*, 81 Okla. 176, 186 Pac. 730."

Counsel then states that the tentative order contains no purported or pretended finding supporting or justifying the final order. The tentative order, which as heretofore stated, was based upon the pressure charts submit-

ted by the distributing gas company. On page 9 of the record will be found the Commission's findings of fact and order of January 10, 1920, and therein is contained the exact condition reflected by the pressure charts filed with the Commission by the distributing company. It is upon the evidence reflected by these charts showing the pressure which had been maintained on the different days considered in the case, and the findings of the Commission based upon those pressure charts are set forth distinctly and succinctly in that order. They are not only findings of fact clearly and specifically set forth therein, but they are numbered and lettered in great detail and the amount of pressure upon the gas mains in each particular district are set forth with exactness and the percentage of rebate based upon that lack of pressure is definitely established and required. These findings of fact and the order of the Commission was the basis of the hearing of the Commission, resulting in the order of June 7, 1920, which found that the gas company had not shown sufficient reason for non-compliance with the order based upon such findings. The Supreme Court of the State took the two orders and construed them jointly as is shown by the language of the court heretofore quoted, to the effect that the Commission had found that an equitable distribution of loss arising from poor and inadequate service as between the gas companies and consumers, could be reasonably arrived at by discounting the bills for service rendered on the basis

outlined in the order, and referring to the extensive computation based upon the evidence.

Counsel, at pages 63, 64, 65, 66, 67 and 68 sets forth certain quotations from the decision of the Supreme Court of the State of Oklahoma, heretofore referred to, and the decisions of *Wichita, R. & L. Co.* v. *Public Utilities Commission*, 260 U. S. 48, and *Interstate Commerce Commission* v. *L. & N. R. Co.*, 227 U. S. 88, none of which deal with similar situations to that now under consideration in any sense, but as heretofore shown, deal with entirely different situations where there was conflicting evidence and where there was a lack of evidence with respect to requirements of additional facilities to that which had theretofore been maintained by the companies concerned.

II.

Under Proposition 2 it is asserted that:

"The order is not supported by a scintilla of evidence. It is contrary to the indisputable character of the evidence and purely arbitrary, a mere fiat."

Counsel evidently goes upon the theory that the Commission would have no right to make an order based upon the company's own evidence. However, as heretofore repeatedly stated, the order and requirement of the Commission was based upon the pressure charts voluntarily submitted by the distributing company, with a request upon

the part of that company that the charts be calculated and that the amount of refund be determined. No other evidence could be taken as the basis of such refund. No other evidence could be introduced touching upon the deficiency in the service for the period under consideration, upon the theory which was applied in this case by the Commission and applied in the case of *Oklahoma Natural Gas Co. v. State*, 258 U. S. 234. Counsel quotes the statement made by the attorney for the Corporation Commission as tending to show that no testimony was introduced upon behalf of the Commission or upon behalf of the patrons. This statement was not made as an admission that no testimony was necessary, but as a mere declaration that the testimony introduced and admissions made by the company was sufficient basis for the order, regardless of testimony which might have been introduced in support thereof. He also refers to references made by the Supreme Court of the State of Oklahoma to the amount of testimony introduced and to the requisite expense necessary to adjust an ordinary gas stove so as to burn gas at low pressure, insisted upon by the company. We have heretofore referred to the pages of the record where this testimony is found.

On page 75 of counsel's brief he refers to the order reviewed by this Court in *Oklahoma Nat. Gas Co. v. State*, 258 U. S. 234, where the Commission said:

"The rule adopted in this case must necessarily fail

> when the day does come when there is an actual shortage of gas available, though ample transportation facilities exist; since after partial failure of the supply there will be, as the same continues to decrease, some cause for a partial as distinguished from a full service. All users of gas might well exercise the precaution of preparing for use of other fuel as an adjunct to gas for fuel in times of severe cold, and as a substitute therefore, when they are unwilling to abide by the generally accepted manner or means of measuring the same."

Counsel does not quote the entire statement made by the Commission in that connection, and the latter portion of the statement explains exactly what the Commission had in mind by the use of the language quoted. The very next paragraph of the language proceeding with the discussion of gas shortage explains by an example just exactly what the Commission had in mind, and reads as follows:

> "For example: Some plan might be worked out whereby gas for use under boilers used to heat large buildings by steam or hot water might be withdrawn, and coal resorted to in periods of stress. Examples need not be multiplied, as details along this line may be worked out by a conference between experts of the companies and of the Commission."

Thus it is seen that the full text of the Commission's language discloses that that portion used by counsel is not only unfair, but actually puts a construction thereon which is not justified by the full text. However, in this connection it might be proper to observe that no conference as suggested by the Commission has ever been proposed by

the gas company, and no steps had been taken prior to the shortage now under consideration, in conformity to the suggestion made by the Commission.

Counsel then refers (page 76 of his brief) to a rule promulgated by the Commission on August 10, 1922, and found in the Annual Report of the Commission for the year ending June 30, 1924, at page 213 thereof, and makes the assertion that the Commission itself, becoming convinced that its requirement of 4 oz. as a standard of pressure was arbitrary and impossible to maintain, reduced the amount of pressure required from 4 oz. to 2 oz. This declaration is interesting and rather surprising, because of the fact that it is absolutely not supported by the facts and is untrue, as is clearly disclosed by the language of the rule quoted upon page 77 of brief. The rule provides:

> "Rule 22. (a) Maximum and Minimum Limits: The pressure of gas supplied by any utility, as measured at the outlet of the utility's service pipe to any consumer, or, in the case of high pressure system, at the outlet of the house governor, shall be maintained as uniformly as practicable and it shall never be less than 2 ounces nor more than 8 ounces, except as may be required for commercial or industrial purposes.
>
> "(b) Allowable Variation. The maximum pressure of gas at the outlet of the utility's service pipe, or house governor, on any day to any consumer, shall never be greater than twice the minimum pressure on that day at that outlet.
>
> "(c) No utility shall be deemed to have violated the preceding paragraph of this rule if it can be shown

to the satisfaction of the Commission that the variations occurring in gas pressure were due to temporary conditions clearly beyond the control of the utility."

The fallacy of counsel's contention is clearly shown by a reading of the order, which deals entirely *with the amount of pressure which shall be required at the outlet of the utility's service pipe to any consumer, and which requires at said outlet not less than 2 ounces nor more than 8 ounces, except for commercial or industrial uses.*

We have attempted to show heretofore that the pressure of 4 ounces required by the Commission's order and used as a basis for the refund under consideration here, *was not at the outlet at the consumer's house*, but was the required pressure to be maintained upon the gas mains of the distributing company in the various sections of the town. We have repeatedly asserted that the pressure at the outlet of the house might be 2 ounces or less at a time when the pressure at the regulator station of the gas mains was 4 ounces. The order quoted and referred to by counsel has no connection whatsoever with the pressure required upon the mains of the company and does not deal at all with the same principle or proposition as was dealt with by the Commission in its General Order No. 1599, or in the order now under consideration, which requires rebates and refunds for inefficient service.

The greater portion of the discussion and the citation

of authorities under this proposition appears to be, in effect, a mere begging of the question by contending that the Commission and the Supreme Court of the State of Oklahoma had decided wrongfully. It also consists largely of repetitions of contentions of counsel theretofore discussed in other parts of the brief.

III.

Under this proposition it is contended that:

"The adoption of 4 ounces as a standard of pressure made without evidence purporting or pretending to justify it, and in the face of undisputed evidence that it was impossible to maintain it in extreme cold weather, and further, that better service could be rendered at a pressure of 2 ounces than at 4 ounces, was arbitrary and capricious, and therefore violative of the Fourteenth Amendment."

As heretofore stated, the standard of 4 ounces, insofar as its application as a principle is concerned, to be applied generally in connection with gas service, was not determined at the hearing in this cause. This principle had been considered at a general hearing conducted on the 4th day of February, 1919, at which appellant, as well as all the other gas companies who desired to appear, did appear before the Commission and presented fully their contentions with respect to that matter. The hearing was conducted after the constitutional and legal requirements with respect to general hearings had been fully complied with, and the order was written—Order No. 1599—after appellant as well as the other gas companies had been afforded

full opportunity to present all the testimony which they desired to present, and after the promulgation of the order reflecting the conclusions of the Commission, appellant was apparently satisfied that it was reasonable, and, as a matter of fact, took no appeal from the order as under the constitutional provision it had a right to do. Moreover, no application has ever been made by appellant or other gas distributing concerns within the State of Oklahoma since the promulgation of Order No. 1529 for the modification of said order and no formal objection has ever been presented to the Commission to the terms and requirements contained therein, but the gas companies have accepted its requirements as binding, and it was for this reason that the cause now before the court, originated by the application of the distributing company itself, and the presentation of the pressure charts required by Order No. 1529 showing the pressure maintained on its mains during the period under consideration.

In this connection we call attention to the decisions of this court in the case of *Wadley Southern Railway Co. v. State of Georgia*, 235 U. S. 651, 59 L. ed. 405, where it is held that a state statute under which enormous penalties are imposed for violation of the Commission's order is valid under the Fourteenth Amendment to the Constitution. This case also held the decision of the State Commission of Georgia, imposing a penalty of $5000 per day

for violating an order of the State Commission as not being in violation of the Fourteenth Amendment to the United States Constitution, where, under Section 2625 of the code, the carrier has the right to judicially review by way of suit against the commission. Particularly applicable to the contention of counsel upon this proposition is that portion of the decision in this case which holds that a carrier, which after reasonable notice of the making of a commission order, failed to resort to the available remedy by which it could test the validity of said order, and, instead, waited to attack its validity until the Commission sued to enforce its order, the court holding that such carrier could be subjected to the penalty prescribed by the commission's order without violating the Fourteenth Amendment to the Constitution. See, also, *Southwestern T. & T. Co.* v. *Danaher*, 238 U. S. 482, 59 L. ed. 1419; *Gulf, C. & S. F. Ry. Co.* v. *State of Texas*, 246 U. S. 58, 62 L. ed. 574; *Williams* v. *St. Louis, I. M. & S. R. Co.*, 251 U. S. 63, 64 L. ed. 139.

In the case of *Wadley Southern Railway Co.* v. *Georgia*, above, the court in disposing of the attack made upon the Georgia statute as being violative of the Fourteenth Amendment to the Constitution of the United States, does so in the following language, which appears to us to have controlling significance upon that question in this case:

"In the light of this unbroken line of authorities,

therefore, a statute like the one here involved (under which penalties of $5000 a day could be imposed for violating orders of the commission) would be void if access to the courts to test the constitutional validity of the requirement was denied; or, if the right of review actually given was one of which the carrier could not safely avail itself.

* * * * * * * * *

"This point is brought out in the statement of the brief of the attorney general and counsel for the state, wherein it is said that 'the safeguards thrown around persons and corporations affected by this (penalty statute) are such as to rob it of the charge of imposing such enormous and grossly excessive penalties as to render it unconstitutional. In the first place, such persons and corporations are entitled to a hearing before the commission (a contention already discussed). And, in the second place, provision is made for the institution of suits against the railroad commission of Georgia when its acts are illegal or unconstitutional (Civil Code [Ga.] 1911, Sec. 2625). From an examination of that section of the Code it is quite clear that it recognizes the right to a judicial review of administrative orders. Until it has been given a contrary construction by the state court, it must be here construed in such a way as to leave it valid, and as conferring that sort of right which furnishes the adequate and available remedy which meets the requirements of the constitution. Any other construction would not only impute to the legislature an intent to deny the equal protection of the law, and to permit the carrier to be deprived of property without due process of law, but it would operate to nullify the penalty section as a whole.' Giving, then, Section 2625 that construction which makes it constitutional, and it appears that the laws of Georgia gave to the Wadley Southern R. Co. the right to a judicial review of the order of March 12, 1910, by a suit against the Commission."

In view of the constitutional right of appeal afforded by the Constitution of the State of Oklahoma (Section 20 of Article IX), as well as the specific provision of statute allowing such appeals from actions of the Corporation Commission (Section 3466), and in view of the fact that in this very case an appeal was taken to the Supreme Court of the State, where the Gas Company enjoyed a review of the Commission's actions, and in view of the fact that the Constitution of the State of Oklahoma (Section 19 of Article IX) provides for the suspension of further or additional penalties for the violation of the orders of the Commission pending any appeal therefrom, it appears to us that this decision is controlling in the case now under consideration upon the question of the contravention provision of the Fourteenth Amendment to the Constitution of the United States.

In this proposition, as in numerous others heretofore pointed out, counsel confuses the pressure at the burner tip or at the consumers' outlet with the pressure required by Order No. 1599, and the pressure adopted as a basis for the refund in this particular case. Order No. 1599 and the order here complained of did not deal with pressure at the burner tip, as heretofore repeatedly stated, but dealt with the pressure required to be maintained upon the company's gas mains in the different sections of the city served. The statement is made by counsel that the undisputed evi-

dence of numerous reputable witnesses, as well as the experience of the three cities, all north of Oklahoma City, and that of J. F. Owens in Oklahoma City, showed that better service could be rendered at a 2-ounce pressure than at 4-ounce, *if the appliances were properly adjusted*, and further, that it is impossible to maintain a 4-ounce pressure in extreme cold weather. This testimony, as disclosed clearly by the record and as pointed out heretofore, was not as to the pressure at the regulator station on the gas mains, but each of these witnesses at all times testified with respect to the pressure at the burner tip and at the consumers' outlet. We reiterate that the pressure of 4 ounces at the regulator stations on the mains in the district served by the regulator stations might be 4 ounces, and the pressure at the burner tip need be only 2 ounces. Throughout this record and throughout appellant's brief this attempt at confusion is repeatedly made. However, in support of this proposition, counsel at page 80 of his brief cites the cases of *Interstate Commerce Commission v. Louisville & Nashville* R. Co., 227 U. S. 88; *Northern Pac. Ry. Co. v. Dept. of Public Works*, 268 U. S. 39; *State of Washington ex rel. v. Fairchild*, 224 U. S. 510; *Postal Tel. Cable Co. v. City of Newport*, 247 U. S. 464; *Chicago, R. & Q. R. Co. v. Chicago*, 166 U. S. 226; *Londoner v. Denver*, 210 U. S. 373; *Interstate Commerce Commission v. Union Pac. R. Co.*, 222 U. S. 541. A study, however, of the

cases cited in support of this proposition discloses the fact that none of them are controlling or applicable insofar as this cause is concerned.

The first case, *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88, has heretofore been cited under Proposition No. 2, and has been discussed and shown not to be applicable to the facts in the cause.

In the case of *Northern Pac. Ry. Co.* v. *Dept. of Public Works*, 268 U. S. 39, the Department of Public Works had reduced the rate on log shipments in a hearing conducted, but in which no ascertainment of the actual operating costs of the particular traffic was found, but its conclusion was arrived at by the application of a composite figure representing the weighted average of operating costs of 1000 gross ton miles of all revenue freight carried on the four systems of railways involved and made that the basis of estimating the operating cost of the log traffic. The evidence tended to show that the existing rates were so low as not to yield any return upon the property employed in the business, and that the rates do not defray fully the operating cost of the traffic and its proportion of the taxes. No attempt was made to show that the testimony introduced by the carriers was untrustworthy. This court held that the method adopted was erroneous.

In the case of *Washington ex rel.* v. *Fairchild*, 224 U. S. 510, the order considered required the physical connec-

tion of several railroad systems at ten various points in the state of Washington. The Commission's own witness testified as to the necessity for such connection at only one point out of the ten, and only one shipper was called or testified, and he testified that one connection was all that was necessary, but presented no information as to the volume of his freight business, nor the saving which would result to him or other shippers. No merchants or shippers from the other points involved were called. There was no proof of the volume of business at any of the places, nor as to the amount of freight which would be accommodated through these connections, if constructed. There was no testimony as to the proper revenue that would be derived from the use of the track connections, nor the saving in freight or otherwise that would result to shippers. The Commission's inspector himself said that the connections would develop very little business. No evidence of inadequate service or proof of public complaint or of public demand was presented, and there was no proof that freight had been offered in the past for shipment between the points, nor that there would be any in the future. The court properly held that the evidence was insufficient.

In the case of *Postal Tel. Cable Co. v. City of Newport*, 247 U. S. 464, the lower court had determined the matter upon the pleadings, holding that every point raised by defendant, either of fact or law, was immaterial, and the

decision was rendered upon that basis. This court held opportunity to be heard was not accorded. The matter was reversed and remanded for further proceedings not inconsistent with the decision.

In the case of *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, there was upheld a condemnation proceeding wherein property was taken for public use for street purposes, where the damage had been appraised at $1.00. We find nothing in this case which would be helpful or determinative of any of the issues here.

In the case of *Londoner* v. *Denver*, 210 U. S. 373, the City of Denver undertook to impose special taxes against property under the provision of the charter of that city, which taxes had been protested in writing but which protest was overruled without hearing, without notice of time or place at which hearing and action thereon would be taken. This court held that the procedure did not constitute due process.

The case of *Interstate Commerce Commission* v. *Union Pac. R. Co.*, 222 U. S. 541, an order of the Interstate Commerce Commission was attacked on the ground that the order was made without evidence, the judgment of the lower court enjoining the order of the Commission was reversed and the order of the Commission upheld, notwithstanding it was found and decided that there was no finding of fact with respect to the effect of the rate es-

tablished by the Commission and no specific testimony dealing directly with the matter considered.

Considerable stress is placed by counsel upon the decision in the case of *Kansas City Gas Co.* v. *Kansas City*, 198 Fed. 500, in which an ordinance of Kansas City was held unconstitutional which imposed a fine of from $100 to $500 upon the gas company failing to "so control its source of supply and adjust its mains for the distribution of natural gas, that the minimum pressure of said gas at every point in the city where natural gas is supplied for consumption shall not be less than 5 inches water pressure." However, it will be observed that the pressure required is a minimum pressure at every point in the city where natural gas is supplied for consumption. In other words, the pressure required by that ordinance was the pressure at the curb of the consumer or at the nearest point to the consumer which the service lines of the company reach. Counsel states that such a pressure amounted to not quite 3 ounces. He also contended, however, throughout the brief, that the Kansas City system at the present time operates upon a 2 ounce pressure. There was nothing in the Kansas City case to indicate what pressure would have been reasonable in the various districts served by the Kansas City Gas Company at the regulator station or how that pressure would have compared with the pressure necessary and reasonably possible to be maintained at the burner tip of the consumer. It should

also not be overlooked that the ordinance was a criminal ordinance, imposing punishment by fine of from $100 to $500 for each violation. In other words, there was no attempt made by the ordinance to rectify the inefficient service upon the basis of merit or upon the basis of comparative service, as in the present case, but as a punishment imposed by ordinance upon the company's failure to maintain the pressure required. Another feature of the decision is the fact referred to, that the Gas Company in that instance did not control the source of supply, and that its contract with the Kansas Natural Gas Company, a distinct corporation with which it had contracted for its supply of gas, "only required that company to only furnish such supply for such a period of time as the wells and pipe lines of the party of the first part, and such other resources as the party of the first part shall be able to command or capable of supplying." In the present case, the Oklahoma Natural Gas Company has devoted large portions of its capital upon which its rates are based to the production of natural gas. In other words, it is a producer of natural gas itself, and has dedicated a large proportion of its capital invested to that purpose.

The case of *Consolidated Gas Company* v. *City of New York*, 157 Fed. 849, is also cited by counsel at page 87 of his brief in support of his contention. It will be noted, however, in this case both the master and the court found that the testimony is sufficient to justify the pressure re-

quired, and that such pressure is not physically impossible provided the gas system of the city be reconstructed, and that by the expenditure of four million dollars for the construction of mains, it might be possible to establish and maintain the pressure called for by the acts, and that the unsurmountable obstacle in the way of its enforcement would be the expenditure of a large sum of money which would make it necessary to place the gas mains in such a condition as to stand the pressure. The case was appealed to this court; *Wilcox* v. *Consolidated Gas Company*, 212 U. S. 19, where the judgment of the lower court, insofar as the pressure requirements is concerned, was affirmed; but the opinion, as it appears to us, clearly distinguishes that case from the one now under consideration by the use of the following language:

> "The evidence shows that to put a pressure such as is demanded by the acts upon the mains and other service pipe in their present condition, would be to run a great risk of explosion and the consequent disaster. Before compliance with this provision would be safe the mains and other pipes would have to be strengthened throughout their whole extent and at the expenditure of many millions of dollars from which no return could be obtained at the rates provided in the acts."

It must not be concluded, however, that the court in any wise in that case, by its decision, relieved the Gas Company of pressure requirements at the hands of the state, even though the pressure of two and one half inches

was held to be dangerous on account of possible explosion, for the court says:

> "The obligation would remain upon the company to have a pressure sufficient to insure a light of twenty-two candle power as provided in the acts."

In other words, this case is an authority in favor of reasonable regulation with respect to pressure necessary to render efficient service, rather than an authority against such regulation.

The cases cited by counsel on pages 91, 92, and 93, have heretofore been discussed and disposed of with the exception of the case of *Burns Baking Company* v. *Bryan*, 264 U. S. 504, where this court had under consideration a statute of Nebraska requiring bread in quantities of twenty-five loaves to maintain a specific weight twenty-four hours after baking. Counsel cites this case in support of his contention that the requirements of 4 ounce pressure on the gas mains is less efficient than 2 ounces. However, the two cases are easily distinguishable. Bread is a commodity. There is no monopoly in the manufacture or sale of bread. Bread may be purchased at one of a half dozen possible different places in nearly all communities, or may be made at home. There is no service involved in the sale of bread in the same sense that the transmission and distribution of gas constitutes a public service. No franchise is required for the sale of bread, no governmental prerogative need be exercised or obtained in connection with the manu-

facture or sale of bread. The price of bread ordinarily is not regulated by the state, but moreover is subject to competitive adjustment. *Wolf Packing Co.* v. *Ct. of Ind. Rel.*, 262 U. S. 522, 67 L. ed. 1103. However, while discussing the regulation of bread weights, ordinance requirements in this respect have been upheld as not being in violation of due process of law in the following cases: *Chicago* v. *Schmidinger*, 243 Ill. 167, 44 L. R. A. (N. S.) 632, 226 U. S. 578, 57 L. ed. 364; 88 Atl. 453. These cases hold that the reasonableness of such ordinances or requirements is dependent upon the individual ordinance or requirement.

IV.

Under proposition IV it is asserted that:

"The order is arbitrary and capricious in that the discounts or rebates ordered were not based upon the relative quantity of gas which a consumer could get in a given time at the various pressures, or upon the relative density and heating value of the gas furnished at the different pressures, or upon both combined. The order was based upon nothing except the commission's arbitrary will."

The discussion under this proposition is merely a rehash of that which has been argued in other portions of the brief. It is contended under this proposition that because forsooth a cubic foot of gas can actually be delivered under very slight pressure, that notwithstanding a cubic foot of gas might not be worth anything in the way of serv-

ice to the patron, that the patron should be compelled to pay as much for that cubic foot of gas as he would pay for a sufficient number of cubic feet to meet his requirements. In the light of the fact that it is service which is required and not a single cubic foot or a number of cubic feet of gas during a given period of time, this contention appears to us to be obviously absurd. On page 97, counsel admits:

"It is true that gas will flow through the lines more rapidly at 4 ounces than it will at any lower pressure. Through the same size service pipe it will take a consumer longer to get 1000 cubic feet at 1, 2, or 3 ounces than it will to get the same quantity when the pressure is 4 ounces."

This admission, it seems to us, clearly upsets the proposition as stated by him in the beginning, as it was upon this very hypothesis and upon the showing of the pressure regulator charts presented by the distributing company, that the order involved in this cause was made by the commission. We have heretofore included a calculation based upon the evidence of appellant, which shows exactly the number of heat units that a patron could secure during any given period of time at 4 ounce pressure and less than 1 ounce pressure. The testimony of appellant's own witness was to the effect that gas at one half once pressure contained 98.5 percent heat units as compared with gas at 4 ounce pressure, and that a consumer, at 4 ounce pressure in a given time, receiving 1000 cubic feet of gas, would only receive for the same length of

time at one half ounce pressure, 350. Multiplying this out, it is found that a consumer receiving his gas at 4 ounce pressure for the period would receive 100,000 heat units, while at one half ounce pressure he would only receive 33,400 heat units. In case his demand for adequate service is 1000 cubic feet and he only received 350 cubic feet actually delivered, we state the proposition positively that he should not be required to pay upon the basis of cubic feet as disclosed by the meter readings *for that inefficient quantity which is less than required, and which might amount to absolutely no service at all.*

Counsel repeatedly, at pages 98, 99 of his brief, refers to a service that will pass a given number of cubic feet per hour. By the term "service" he means not actual service rendered, but the facility which is used and through which the gas flows. He attempts to show that service can be rendered at 1 ounce or less than 1 ounce and makes the comparison as between the amount of service received at 4 ounces as compared with 1 ounce. If he means by this that a man could get some gas at 1 ounce, his statement, of course, is true; but if he means that a man can secure as efficient service at 1 ounce during a given period of time as at 4 ounces, then his own testimony disproves his statement. Moreover, as heretofore pointed out and as shown by witness Weymouth (R. p. 125), it is conceded that the rapidity at which gas is supplied has much to do with the combustion and the mixture of the gas with the

air as it enters the appliance. This witness testified, and it is not contradicted, that gas at low pressure, that is, when furnished with less rapidity than is ordinarily expected or required, does not draw sufficient air into the mixer as it enters the stove to properly mix and combust with the greatest efficiency. This fact should be considered together with the inadequate quantity in cubic feet of gas supplied, in arriving at any conclusion with respect to efficient service.

Counsel then, at page 100 of his brief, sets out again seven of the identical cases which had been cited under Proposition III, and which have been discussed and referred to heretofore and shown not to have had any application to the principle here involved. However, in a very recent case by the Supreme Court of the State of Oklahoma, *Oklahoma Gas Co.* v. *Corporation Commission*, 111 Okla. 6, 237 Pac. 838, the Supreme Court of the State, in another case entirely separate and apart from the ones referred to heretofore, again had the matter of gas service under consideration on appeal from an order of the Corporation Commission, requiring refunds in the city of Shawnee, Okla., on account of *inefficient quality* of the gas supply as contra distinguished from an *inadequate supply*. In the opinion the court considered the applicability of Order No. 1028 of the Corporation Commission which requires natural gas companies within the State of Oklahoma to at all times, so construct and equip and main-

tain their pipe lines, mains and distributing systems as to be able at all times to furnish an adequate supply of gas for domestic consumption, and is thereby ordered to furnish and supply at all times an adequate amount of the proper quality for heating, cooking and lighting for domestic consumption. As heretofore stated, the Supreme Court of the State of Oklahoma had theretofore passed upon this requirement and had held with respect thereto (*Oklahoma Nat. Gas. Co.* v. *State*, 78 Okla. 7), that; This Order (1028) of the Commission's, is as much a law of the state as if enacted by the Legislature, and the utilities furnishing natural gas are as much subject to its provision as if it had been made an integral part of the contract between consumer and utility."

In the case now being referred to, the gas company had raised the constitutional questions which are now raised in this cause, and had in addition, asserted two propositions. First, that it had furnished gas from the general average production of the several gas fields; second, that the stoves in Shawnee could have been adjusted so as to burn the gas as furnished, with sufficient heat to meet the reasonable requirements of the consumers. The court, in disposing of the contention of the gas company, did so in the following language:

> "Chapter 93, Session Laws 1913, gives the Corporation Commission general supervision over all public utilities with power to establish rates and to

prescribe rules, requirements and regulations relating to their service for the public.

"The Corporation Commission is vested by law with authority to prescribe rates to be charged by public service companies for gas delivered to their consumers. The maximum rate fixed by the Commission is based upon 100 percent efficient service to be had from a 'given volume' of gas. The terms 'given volume' of gas has reference to the quality and class of gas, which the Corporation Commission contemplates should be delivered to the consumer to meet the requirement for 100 percent efficient service upon which the rate is based. The statement of the rule meets with less difficulty than its definition. There are four persons concerned; the producer of the gas, the common carrier to the city gates, the distributing company, and the consumer. The first three parties are entitled to a reasonable return for their property and service. The duty rests upon the former three parties to deliver a fair quality of gas from the general gas production of the fields to the consumer, reasonably suited to meet the requirements of the latter, with no greater burden than a reasonable profit to the three former parties. The situation and relation of the parties, one to the other, require the application of the golden rule, 'live and let live.' The rule for ascertaining the 'given volume' of gas as contemplated by the Commission, to constitute 100 percent efficient service, is a question of law for the Commission and court; whether or not the gas as furnished to the consumer for a given period of time, equals the degree of efficiency or quality upon which the rate is based, is a question of fact to be established by proof in the particular case. The precentage of hydrocarbon and nitrogen contained in natural gas determines its heating value and the heating value of a cubic foot of gas establishes its number of b. t. u's. If the fair average of the general production from the gas fields contains four or five percent of its diluting agency

known as nitrogen, its volume would give the 100 percent efficiency contemplated by the Commission in fixing the rate. The burning of this quality of gas would give a certain number of heating units and the stove would consume a given volume of gas in a certain period of time. The gas company may then dilute the same gas with nitrogen, or by any other means, to the extent of 20 percent, which would result in displacing 20 percent of the heating properties of the gas. It would then be necessary for the consumer to readjust his stove so that it would consume 20 percent plus 100 percent, for the given period of time in the first instance, to give the number of heating units received in the first instance. The consumer would receive the same heating units as in the former period of time, but would consume a greater volume of gas than used in the first instance. This would not constitute efficient service as measured by the standard upon which the rate is based. The term 'efficient service' includes pressure, volume of gas, quality of gas, and the quality of gas generally produced in the fields and available for supplying the consumers. All these elements and the general conditions must be taken into consideration in determining what the Commission meant in using the term 'adequate supply' and 'good quality of gas' in Order 1028. The terms as used in Order No. 1028 must be construed in the light of the conditions and circumstances entering into the action of fixing the rate for gas to the consumer by the Commission. What might be a good quality of gas as defined by the order under one condition, might be a poor quality under the conditions and circumstances existing during another period of time. *Oklahoma Natural Gas Co.* v. *State et al.*, 78 Okla. 5, 188 Pac. 338, 258 U. S. 234, 66 L. ed. 590; *Nowata County Gas Co.* v. *State*, 72 Okla. 184, 177 Pac. 618."

It is interesting to note in this connection that in this case the gas company made the contention that it had not

breached its duty in furnishig gas of a particular quality to the consumers for the reason that the Commission had not fixed a given number of b. t. u's. which the gas contained at all times. Quite a striking dissimilarity between the contention there and the contention here, for the reason that in that case they complained because of the fact that the Commission had not established a standard, and here they complain because the Commission had established a standard, which standard had been fixed and arrived at after a general hearing with full notice as required by the Constitution of the State of Oklahoma, and at which the gas company itself, appellant here, had appeared and participated, and from which it had not taken an appeal.

V.

Under this heading it is contended by appellant, that:

"The order deprives appellant of its property without due process of law and denies it the equal protection of the law, in violation of the Fourteenth Amendment, because its effect is to impose upon appellant, the basis of whose service is an exhaustible commodity which man cannot make, an absolute obligation, which appellant never assumed, to furnish an adequate quantity at 4 ounces pressure at all times, at all events, and under all circumstances; and penalizes appellant for not doing so, nothwithstanding appellant had done everything in its power to furnish the full amount and pressure demanded and desired, and notwithstanding appellant's rates, even without deduction or discount of bills, did not give it a reasonable return on the value of its property used in rendering the service."

As heretofore stated, in the transmission and distribu-

tion of natural gas, an important element in connection with the rate to be charged is the service which is rendered to the patron. Also, as heretofore stated, we reiterate that service depends not upon one cubic foot of gas or any given number of cubic feet less than the number which is required to produce the desired result. The contention that appellant is required to furnish an adequate quantity at 4 ounces at all times, at all events, and under all circumstances, and that the order penalizes appellant for not doing so, notwithstanding appellant's rates, without deduction or discount of bills, did not give it a reasonable return upon the value of its property used in rendering the service, is merely, in effect, begging the question, and ignoring the well known principle of rate regulation as applicable to natural gas supply; that on account of the fact of the hazard incident to such a business, rate-making bodies are required by law to give more favorable consideration in establishing rates to concerns so engaged, than they are to other utilities engaged in the rendition of other public service. In other words, the Oklahoma Natural Gas Company, in its cases before the Corporation Commission of the State of Oklahoma, makes much ado about the hazard of the business incident to the supplying of its patrons with natural gas, on account of the fact that it is an exhaustible commodity and is connected with a mining venture, and therefore should enjoy a larger return upon the capital employed in the business, than if it was engaged

in some other character of public service. This principle is well recognized, and the company appellant here has enjoyed the benefits of just that contention in the adjustment of its rates from time to time within the State of Oklahoma. It cannot therefore be heard to say and offer as an excuse for its failure to render efficient service, the hazard of the undertaking, since that element of hazard has been taken care of and has been considered in each adjustment of rates which it has been necessary for the Commission to make throughout the past several years.

Counsel, at page 117 of his brief, quotes a decision of the Supreme Court of Oklahoma in *Oklahoma Natural Gas Co. v. Corporation Commission*, 90 Okla. 84 92, which was a rate case in which the court, at considerable length, went into this matter as justifying an additional allowance in the form of rates for this very company. Other citations of orders of the Commission, and of decisions of the Supreme Court of the State of Oklahoma, might be cited showing that this principle is applied in the State of Oklahoma in the adjustment of gas rates.

Numerous quotations from the testimony are inserted on pages 108, 109, 110, 111, 112, 113 and 114, tending to show the character of the commodity natural gas, and attempting to show the difference between natural gas service and the service rendered by other public service concerns. As heretofore stated it is conceded that the natural

gas business is in some respects different from other characters of public service. However, in the case decided by this Court, *Okla. Nat. Gas. Co.* v. *State*, 258 U. S. 234, *supra*, the same identical contention was made in every respect as to the character of natural gas service, and its distinction from other forms of service as is made here, and each of these contentions was overruled by this Court. The same contention has been made in each instance in the Supreme Court of the State of Oklahoma, and in four distinct decisions involving different orders of the Commission, and all of these contentions have been overruled. *Nowata County Gas Co.* v. *State*, 72 Okla. 184, 177 Pac. 618; *Okla. Nat. Gas Co.* v. *State*, 78 Okla. 6, 188 Pac. 338; *Okla. Nat. Gas Co.* v. *State*, 110 Okla. 297; *Okla. Nat. Gas Co.* v. *State*, 111 Okla. 7.

Upon the obligation assumed by public service companies, counsel cites a rule at common law with respect to carriers, inkeepers, etc., as being that a carrier at common law was required to receive all goods and passengers without discrimination, but if his coach is full he is not liable for failing to transport more than he can carry. He also refers to inkeepers as being excused from serving except to the extent of facilities or room which he has at his disposal. These statements of the law we believe to be correct. Yet the comparison is not proper nor permissible for the very good reason that the gas company has undertaken to render service by connecting with each of

its patrons in Oklahoma City. In case the gas supply should fail and insufficient amount is available to take on additional consumers or additional towns or cities, then the company undoubtedly would be justified in refusing to connect them. However, the company, in this instance, has connected and has been connected for years with each of the patrons affected, and is engaged in rendering the service, and the patron is entirely dependent upon the company for this particular service and the service cannot be secured otherwise. The case of *Waukesha Gas & Electric Co.* v. *Waukesha Motor Co.* (Wis.) 209 N. W. 590, is also cited. In this case it appears that there was involved a damage suit by the Waukesha Motor Company against the Waukesha Gas & Electric Co. for failure to supply a reasonably adequate gas and electric service in the manufacturing plant of the plaintiff. The proof shows that there was interruption in service, not due to any fault or neglect of the company. It is a fundamental principle in relation to gas service in the State of Oklahoma, that manufacturing concerns are even denied service during shortages of gas or electricity. In other words, it is realized that domestic service should be considered in preference to industrial or manufacturing service. The case cited, in our opinion, bears no relation to the question now under consideration, for the reason of that very fact.

Counsel then cites cases arising under the obligation

imposed upon irrigation companies. He attempts to liken the service rendered by such concerns in the supplying of a quantity of water for irrigation purposes, with the service rendered by natural gas companies, and cites a number of cases in support of his contention that irrigation companies are not responsible for damages in cases of failure of supply of water for use by their patrons. This necessarily brings us back to the oft repeated statement, that natural gas service consists entirely of service and not of the supplying of a commodity, one unit of which might be worth the price which is charged when considered separate and apart from other units necessary to make up that service which would be considered efficient. Irrigation companies undoubtedly are able to supply quantities of water at different seasons of the year, sufficient for the uses at that particular time. However, upon failure of the supply of water, we take it that the irrigation company does not offer the farmer who desires to irrigate his farm, one gallon of water, when, forsoothe, his demands might require 100,000 gallons, and expect him to pay for the one gallon just because it was available for his use, whether he wanted it or not, and whether he could use it or not. In the case of natural gas, this is exactly what is contended for by the gas company.

Counsel devotes considerable space to a discussion of the duty of carriers which he says is the highest type of public service, and he attempts to ridicule the idea that

anyone would consider the advisability of penalizing a carrier for its failure to provide cars or shipping facilities in case of car shortage. He cites newspaper articles and the condition which confronted the State of Oklahoma in 1922 in connection with a shortage of cars. Perhaps counsel had not considered the statute of the State of Oklahoma upon this question. Section 5514, Compiled Oklahoma Statutes 1921, does require railway companies to "furnish suitable cars to any and all persons without discrimination, who may apply therefor in good faith for the transportation of any and all kinds of freight, and to receive and transport such freight with all reasonable dispatch and to provide and keep suitable facilities for the receiving and handling of the same at any station or switch on the line of its road, and also to receive and transport in like manner, the empty or loaded cars freighted by any connecting road to be delivered at any station or stations on the line of its road, * * *" and provides that when cars are applied for under this provision of the statute, and are not furnished, the railroad company so failing to furnish shall forfeit to the party or parties so applying for them, the sum of $1.00 per day for each car failed to be furnished, to be recovered in any court of competent jurisdiction, and all actual damages that such applicant may sustain.

Section 5516, Compiled Oklahoma Statutes 1921, provides the rate of speed at which freight must be trans-

ported within the State of Oklahoma, and provides a penalty for failure to transport at that speed. This statute in some respects is very similar to the principle which the Corporation Commission attempts to apply to gas companies. The statute requires that shipments of freight must be carried forward at a rate of not less than sixty miles per day of twenty-four hours, and upon failure so to do the company shall forfeit and pay to the consignee the sum of $1.00 per car per day or fraction of a day on all carload freight, and one percent per hundred pounds per day, or fraction thereof, on freight in less than carload lots with minimum charge of five cents for any one package, together with all actual damages the consignor or consignee may sustain thereby. It is our opinion that similar statutes will be found in practically all the states of the Union.

He refers also to Pullman companies, and that no rebate or refund is required of the Pullman Company to those passengers who are not able to secure accommodation in Pullman cars. An applicant for a Pullman service wants an entire berth or none, and counsel's rule, in order to be applicable, implies that the Pullman Company would offer an applicant for such service, a part of the berth instead of a full berth. This, of course, is too absurd for consideration. He refers also to patrons of a telephone company who may place a local or long distance call and he says that the service may not

be good, and the connection unduly delayed, but when he does talk the toll is not rebated because he was delayed in getting his connection. The thing desired in that event is ability to talk, and if the conversation is completed that ends it. However, should a patron of the telephone company in Oklahoma City place a call for some person in a distant city, there is no charge allowed in the State of Oklahoma for uncompleted calls, but when the conversation is had, the service is complete. This comparison is also inapplicable for the reason heretofore stated, that in the supplying of natural gas, service is the thing desired and it takes a certain quantity of gas to amount to service, and any limited number of cubic feet of gas less than the amount necessary to constitute service, should not be considered efficient service.

He also refers to water shortage and the fact that the city authorities will not allow the full use of water at such times, but limits the consumption to domestic uses. That is exactly the same principle as applied to gas companies. Gas companies are not allowed under any circumstances to sell to industrial users or large consumers of natural gas, all the gas desired by them in case the supply is necessary for domestic consumption. We know of no circumstance in Oklahoma City wherein the Water Company attempted to charge any domestic consumer for domestic service that was not received.

He also refers to coal dealers, and a man who desires

a certain quantity of coal. Such examples, it seems to us, are so far fetched as not to require comment.

At page 139 of the brief for counsel for appellant, Mr. Wyman on Public Service Corporations, Sec. 1433, is quoted in support of the proposition that the duty of public service is not absolute. The quotation commences with the language:

> "Statutes may be passed defining further the obligations of those engaged in public employment to serve all that apply in accordance with their requirements. But if these statutes go so far as to impose an absolute liability upon the proprietors to act at all events, they ask more than a State can require in view of the Fourteenth Amendment."

Then an example is set out by the author, of the duty of railroad companies to furnish cars within a certain number of days and in the absence of compliance, the imposition of heavy penalties. The author cites in the footnotes, the case of *Houston & T. C. R. R. Co.* v. *Mayes*, 201 U. S. 321. In that case there was involved the imposition of heavy penalties, as well as damages for the failure to supply freight cars for the accommodation of a shipper. The statute there under consideration imposes a penalty of not only the actual damages incurred, but in addition thereto a penalty of $25.00 per day per car for each day of detention. This Court held that that statute was a burden upon Interstate Commerce. This is a fair illustration of the other decisions cited, most of which are railroad

cases, in support of his proposition that the duty of a public utility is not absolute. In all these cases, without exception, so far as we have noted, the statute imposes heavy penalties in the way of damages as well as fines and penalties for failure to supply transportation facilities. None of these statutes attempted to work out a reasonable solution in the form of an adjustment of the charge for the services rendered as does the rule now under consideration, and as a matter of fact, as heretofore stated, the comparison of these cases with the case now before the court, it seems to us is entirely too far fetched for the service is entirely of a different character and there is involved in the one instance simply the pecuniary damage which might result from the lack of shipping facilities in the railroad cases, whereas in this case there is involved public health, public comfort, and public convenience.

Commission's Order No. 1028.

Counsel then takes up Commission's Order No. 1028, and after quoting its provision, makes the statement that the Commission did not purport to predicate the present order upon Order No. 1028, and that appellant was not cited to answer for its violation. He attempts to show that therefore the order should have no application in this case.

The Supreme Court of the State of Oklahoma in all the cases involving gas service heretofore before them,

has seen fit to refer to this order, and this Court has seen fit to also refer to it in the decision of the case of *Oklahoma Natural Gas Co.* v. *State*, 258 U. S. 234, *supra*. The Supreme Court of the State of Oklahoma has declared that this rule is as binding upon a Gas Company in the State of Oklahoma as if the legislative department of the State had enacted it in the form of a statute, and as binding upon a gas company as if it had been made a part of the contract under which they obligate themselves to render service.

It is also argued that the Commission, in the promulgation of its Order No. 1028, did not intend that order to be absolute. The language of the Commission to the effect that it did not intend to impose any unnecessary hardship upon any company or individual engaged in supplying gas, is quoted, as well as the other statement, that

> "Neither will the commission fail to recognize the hazard of the natural gas business."

These statements cannot be construed to mean that the Commission did not intend to enforce the order promulgated according to the reasonable construction of the language used. The only meaning that could be attributed to these quoted parts of the Commission's statement, is the fact as heretofore pointed out, that the Commission in adjusting rates is in duty bound to take into consideration the nature of the business being conducted, and its

hazards, in the establishment of reasonable and just rates for the service which is to be rendered.

The Commission, as well as the Supreme Court of the State, which acts upon appeals to it from orders of the Corporation Commission affecting rates in a legislative capacity and not judicially, has always been to take into consideration the hazard of the natural gas business, and as shown by the decision heretofore quoted from *Oklahoma Natural Gas Co.* v. *State*, 90 Okla. 84, that court has recognized the hazards of the natural gas business, not by releasing it from its duty to render adequate and efficient service, but by the allowance of liberal returns upon capital invested in that character of business. Counsel then questions the authority of the legislature even to condition appellant's right to charge and receive the established rates for its gas actually furnished and used at rates which are fixed on the basis of giving reasonable return upon the furnishing of more gas at a higher pressure than the depleted condition of the gas fields makes it possible for appellant to furnish. It is a fundamental principle of rate-making, which need not be supported by the citation of authorities, that the rate to be charged in any given instance always bears a highly important relation to the character of service rendered. No utility would contend that it should be allowed to earn the same rate for service which is not adequate or efficient, as it would be allowed

to earn for service which is adequate and efficient. The language of the Order No. 1028, requiring gas companies to so construct, equip and maintain their pipe lines, mains and distributing systems as to be able at all times to furnish an adequate supply of gas for domestic consumption, fits in and dovetails exactly with the requirement now under consideration, that the pressure upon the mains of the company shall be kept to a reasonable standard, to the end that efficient service may result.

The argument of counsel appears to result finally in the contention that the gas company should be allowed to continue from year to year to sell what little gas it may have, at the price which has been fixed for efficient service, regardless of whether or not the amount actually furnished results in such efficient service. The testimony of the company's witnesses throughout, appears to be an effort on the part of the company to establish the idea that natural gas must be conserved for the benefit of the gas company, to the end that it may supply at a very low pressure, gas which may be used at a very high price, thus lengthening the life of the company's storage of the commodity which it supplies from year to year. In other words, the domestic consumer is charged with the responsibility of looking after his own service and so equipping his appliances as to be able to burn just that which is supplied, regardless of its volume, or regardless of the

rapidity at which is may be furnished, and that the company should be permitted to continue indefinitely to supply just the quantity which it desires to supply and may have available for that purpose regardless of the result to the consumer.

It is then stated that the existing rates, without deduction or discount, were confiscatory. At the very time of the Commission's investigation with respect to this service, there was being prepared an inventory and appraisal of the gas company's property upon application of the company itself, for an adjustment of rates and for the establishment of a gate rate principle which was very desirable from its standpoint. That relief was granted and rates accepted from the Corporation Commission without complaint at the time, but later appealed from, finally resulting in a rate 50 per cent higher than had ever been enjoyed by the company before, which the company gladly accepted. Later, another adjustment was undertaken, resulting in an order of the Corporation Commission in the early part of 1926, fixing and establishing a rate which was 40 per cent higher than theretofore allowed by the Commission, which rate has been accepted without complaint and without appeal.

The Supreme Court of the State of Oklahoma in the case of *Oklahoma Natural Gas Co.* v. *State of Oklahoma*, 78 Okla. 6, 188 Pac. 338, *supra*, said, with respect to this contention:

"There is no evidence in the record to indicate that the discounts required, reduces the revenues of appellant to a point where it failed to receive an adequate return on the investment legally employed in the business of furnishing natural gas service, *and if such should result from a continuance of the commission's policy, the utilities are not precluded from making application to the commission for higher rates.*"

As suggested by the court in its opinion, this was exactly what was being done at the time of the promulgation of the order now under consideration.

Then counsel attempts to argue (page 142 of the brief) that on account of the fact that the order was not made until March 11, 1916, some time after the Oklahoma Natural Gas Company had secured its right to do business in the Indian Territory as a public utility, that the order would have no effect as against it. As a matter of fact, the act regulating gas companies at all in the State of Oklahoma, was not passed until 1913, a number of years after the Oklahoma Natural Gas Company was authorized to transact business in the then Indian Territory, as a public utility. According to his argument, therefore, his company would not be subject to regulation at all since it was already engaged in the business, at the time of the passage of the act of 1913, conferring jurisdiction upon the Corporation Commission over the transportation, sale and distribution of natural gas.

If counsel's conclusion with respect to Order No. 1028

follows from his argument, then the other conclusion that his company is not subject to regulation at all, would naturally follow.

Mr. Wyman on Public Service Corporations, deals with this question, and it has been dealt with by probably every State in the Union, as well as by this Court. That author, Vol. 2, Sec. 1423, outlines the principle in the following language:

> "The ordinary clauses in railroad charters do not constitute a contract by the State not to regulate rates. Thus, no such contract is created either by the grant of power to carry persons and property, or by the power to make by-laws, rules and regulations, or by the power to fix, regulate and receive the tolls and charges. This is merely conferring on the corporation the powers that an individual carrier would have, and it leaves the corporation, like the individual carrier, subject to the regulation of the State. In Stanislaus County vs. San Joaquin and King's River Canal and Irrigation Company, the charter gave the company the power to fix rates, subject to regulation by a board of supervisors, who, however, were not to reduce the rates below a certain maximum. It was held that this did not prevent the legislature itself from affecting the rates. 'There is no promise made in the act that the legislature would not itself subsequently alter that authority.'"
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> *Railroad Commission Cases*, 116 U. S. 307, 29 L. ed. 636, 192 U. S. 201, 48 L. ed. 406.

In the case of *Chicago & A. R. Co.* v. *Tranbarger*, 238 U. S. 67, 59 L. ed. 1204, this court had under consideration the question of whether or not a penalty feature of the

Missouri laws of 1907 compelling railways to construct transverse openings and rights-of-way and road beds to take care of surface water, in which the question of whether or not said act was applicable to railroads already existing at the time of the passage of the act, the court held that under the police power the act was binding, and effective as against railroads already in existence at the time of its passage.

Moreover, appellant could not be heard at this time to complain as to the applicability of this order, since it had notice of hearing of the intention of the promulgation of said order, and did not avail itself of its constitutional right of appeal or of its right to have the order reviewed on appeal; neither did it apply to the Supreme Court of the State of Oklahoma for relief, as provided by the Constitution of the State of Oklahoma and the laws enacted pursuant thereto.

> *Wadley Southern Ry. Co.* v. *Georgia*, 235 U. S. 651, 59 L. ed. 405.

There need be cited no additional cases in support of the proposition that public service companies, even though they may be engaged in the rendition of public service at the time of the assertion of the right of the State to regulate, are as much subject to regulation as if the statute imposing the regulation was passed before they had secured their right to engage in business. Supporting his

contention, counsel cites the cases of *Southern Ry. Co.* v. *Green*, 216 U. S. 400, and *Leecraft* v. *The Texas Co.*, 281 Fed. 918. These two cases deal with the right of a foreign corporation enjoying the right, privilege and license to engage in business under a permit granted by the sovereignty, to thereafter be taxed in a discriminatory way in additional sums and manner, for the right to continue to do business in the respective states. This court held in the case of Southern Ry. Co. vs. Green, that it was discriminatory to impose a different obligation upon a foreign corporation having the right to tranact business in the state, from that which was imposed upon a domestic concern. The case of *Leecraft* v. *The Texas Co.*, 281 Fed. 918, involves identically the same question: The Texas Company having had a valid and existing permit to engage in business in the Indian Territory side of the State prior to statehood, and had invested enormous sums of money in its business, pursuant to said permit. The State of Oklahoma thereafter attempted to impose a license tax upon that company, different from the tax imposed upon domestic concerns, and the Circuit Court of Appeals held that the statute was discriminatory and violative of the company's constitutional rights. There is no similarity whatever between those cases and the case now before the court; one involving the regulation of the rates and services charged by public utilities in connection with the

rendition of its public service, and the other involving the right to transact business as a corporate body, without being subjected to discriminatory and arbitrary license tax as a condition precedent thereto.

VI.

Under this subdivision it is said:

"The order deprives appellant of its property without due process of law because it arbitrarily awards discounts or rebates upon the gas bills for November and December of several thousand consumers whose entire bills during those months were incurred during the 4 ounce pressure period."

This matter has been discussed heretofore, in both the brief of appellant and in this brief. It was pointed out in the discussion of the testimony that the witness testifying upon this proposition was asked to furnish information upon which he based his estimate and that he replied, he could not do so and it would be impossible to do so. This is found at page 182 of the record. Commissioner Russell, presiding at the hearing (R. page 183), asked the witness, that if he knew of any such instance where patrons were using other fuels than natural gas during the period of low pressure, it should be brought out in the evidence as showing the effect of what is claimed to be the injustice of the order. Counsel for appellant responded:

"It would cost us five times as much to get that information and make a showing as the rebates would

amount to. We have patrolled the business part. We did not patrol the other. This is just an estimate of that."

Yet, in view of this state of the record, counsel says the evidence introduced upon this question was not disputed or contradicted. As a matter of fact, there was no evidence upon this point which could be considered by the Commission.

VII.

It is asserted under this proposition that:

"The order operated to deprive appellant of its property without due process of law in that it permitted the consumers to burn gas twenty-four hours every day while the pressure was less than 1 ounce, and yet absolutely denied appellant any compensation whatsoever for the gas burned."

Of course, it goes without saying in the first place that there was no twenty-four hour period during this time in any given district when the pressure was less than 1 ounce for the entire twenty-four hours, but the pressure at times would be less than 1 ounce and fluctuated from very little more than nothing, to probably 4 ounces at different times. What has been said heretofore with respect to the principle upon which these rebates have been calculated and determined, applies here. It is shown from the record that pressure of less than 1 ounce in the ordinary heating appliances and cooking appliances in ordinary use, amounts to practically no service whatsoever. It is

true that efficiency experts testified that by the expenditure of comparatively large sums of money expended in the adjustment and renewal of appliances, that gas at as low a pressure as 2 ounces, some say less than 2 ounces, could be utilized for cooking purposes. However, as heretofore stated, the rule of the Commission and all rules insofar as that is concerned, are designed to apply to the ordinary person. Rules of the Commission could not be made to apply to any special class, but must be made to apply to all persons situated under ordinary conditions. It has heretofore been shown that it is impossible to secure at less than 1 ounce, pressure, much more than one-third of the quantity of gas that is secured at 4 ounce pressure. Assuming that the equipment is so arranged as to require either for heating or cooking, 1000 cu. ft. of gas per hour, for warmth or otherwise, then the delivery of 334 cu. ft. of gas might constitute, as heretofore repeatedly stated, no service at all. We believe that this has been fully covered so many times that further argument is unnecessary.

CONCLUSION.

In the case of *Oklahoma Natural Gas Company* v. *State of Oklahoma*, 258 U. S. 234, *supra*, there was presented in the original hearing and upon application for rehearing, every contention which is here made. The testimony of experts, similar to those employed in this case,

was presented. The argument was made that the company had not been negligent in connection with the shortage which is dealt with in that case. All of these contentions were made in the Supreme Court of the State of Oklahoma, in all of the cases heretofore considered by that court—four in number. The Supreme Court of the State of Oklahoma, in view of all of the facts, conditions and circumstances in each of those cases, refused to be swayed by these considerations, and has upheld in each instance the order of the Commission, stating that it appeared to be a reasonable solution of the difficulty. This Court specifically in its decision in the former case, covered every objection which is here made, to the order being attacked.

This brief is already entirely too lengthy. Our only excuse for its length is the fact that the brief of appellant is a very lengthy one, and notwithstanding counsel for appellant repeated his arguments under different heads, we felt it our duty to reply to each of the arguments made in the order in which they were made.

The Corporation Commission of the State of Oklahoma has attempted by the method adopted in this case and applied in the other cases, to adjust the differences between the gas company and its patrons on account of the admitted inefficient gas service. There is no dispute as to the essential fact of inefficient service. It is admitted upon practically every page of the record and formally admit-

ted by appellant in numerous places in its brief. Since the case has been heard before upon similar questions and has been decided after careful consideration both upon hearing and application for rehearing, there appears to us to follow but one conclusion and one result, and that is the affirmance of the action of the Supreme Court of the State of Oklahoma upholding the order of the Commission.

Respectfully submitted,

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